Supreme Court, U.S.
FILED

951962 JUN 4 1996

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No.

In The

Supreme Court of the United States

October Term, 1995

Republican Party of Alaska,

Petitioner,

v.

Mike O'Callaghan, Jed Whittaker, Robert Gigler, Alaskan Voters for an Open Primary, and State of Alaska, Lieutenant Governor Jack Coghill, in his official capacity as Lieutenant Governor,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alaska

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Alaska Election Code provides for a single "blanket" primary election in which any voter has the right to vote for any candidate, regardless of the party affiliation of the voter or the candidate. The Rules of the Republican Party of Alaska (RPA) provide that only registered Republicans, registered independents, and registered voters who state no preference of party affiliation may vote in the Alaska Republican primary election. The Supreme Court of Alaska held (3 to 1) that the Alaska blanket primary statute does not violate the right of the Republican Party of Alaska and its members to free political association guaranteed by the First and Fourteenth Amendments to the United States Constitution.

The questions presented are:

(1) Whether this decision conflicts with prior free political association decisions of this Court such as *Burdick v. Takushi*, 504 U.S. 428 (1992); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); and *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981).

(2) Whether it is a violation of the First Amendment right of free political association for the State of Alaska to require the Republican Party to participate in a blanket primary election, in which registered Democrats and members of other political parties may vote on Republican nominees, as a condition of placing Republican candidates on the Alaska general election ballot.

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PETITION FOR WRIT OF CERTIORARI

The Republican Party of Alaska and its members respectfully petition for a writ of certiorari to review a decision of the Supreme Court of Alaska, and request that this matter be considered on an expedited basis.

OPINIONS BELOW

The final opinion of the Supreme Court of Alaska is reported at 914 P.2d 1250 (Alaska 1996). App. 1-43.

JURISDICTION

The Supreme Court of Alaska published its original opinion on March 20, 1996. The original opinion was withdrawn and reissued on April 12, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RPA RULES INVOLVED

The United States Constitution, First Amendment:

> *Freedom of religion, of speech, and of the press.* Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

A.S. 15.25.010:

> *Provision for Primary Election*: Candidates for the elective state executive and state and national legislative offices shall be nominated in a primary election by direct vote of the people in the manner prescribed by this chapter.

A.S. 15.25.030 is reprinted at App. 47-49. Article XII, Section 14 and Article XIV, Sections 1 through 5, of the RPA Rules are reprinted at App. 51-53.

STATEMENT OF THE CASE

PRESENTATION OF FEDERAL QUESTION

The constitutional right of the RPA and its members to free political association was presented to the trial court by the State of Alaska on August 26, 1993, in the Memorandum in Support of State's Motion for Summary Judgment. The RPA identified its First Amendment right to free political association in the first documents it filed in the Supreme Court of Alaska: Memorandum in Support of Motion to Intervene as Party Defendant and Answer to Complaint of Mike O'Callaghan, both filed February 17, 1995.

STATEMENT OF FACTS AND PROCEEDINGS

A.S. 15.25.010 provides for a single blanket primary election in the State of Alaska, in which any voter has the right to vote for any candidate for each public office

listed on the ballot, regardless of the party affiliation of the voter or the candidate. In the blanket primary, the candidates of each political party are selected to appear on the general election ballot for the offices of governor, lieutenant governor, members of the Alaska State Senate and State House of Representatives, and Alaska representatives to the United States Senate and House of Representatives. The Alaska blanket primary statute conflicts with Article XIV, Section 1, of the RPA Rules, which provides that only registered Republicans, registered independents, and those who state no preference of party affiliation shall be allowed to vote in the Republican primary election for governor, lieutenant governor, United States Senator, United States Representative, and members of the Alaska Legislature.[1]

The RPA adopted Article XIV, Section 1, of its rules on March 31, 1990. The RPA requested the State of Alaska to implement its rule for the 1990 primary election. The State of Alaska refused to do so. The RPA then filed an action in the United States District Court for the District of Alaska to require that its party rule be implemented for the 1990 Republican primary election. *Doyle v. State*,

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[1] The RPA rule excludes those persons whose voter registrations show that they are affiliated with another political party. There are 395,493 registered Alaska voters, consisting of Republicans (95,599), Democrats (66,708), Alaskan Independence Party (15,251), Green Party (2,909), other parties (4,726), declared non-partisan (87,411) and undeclared (122,889). *Alaska Division of Elections, List of Registered Voters by Party within District*, May 1, 1996. Under the RPA rule, approximately 77% (305,899) of registered Alaska voters may vote in the Republican primary election.

F90-33 CV (D. Alaska 1990). The District Court declined to do so, however, because United States Justice Department preclearance of the RPA rule had not been obtained in sufficient time to implement the rule in 1990.

After Justice Department preclearance had been obtained, the RPA requested the State to implement its rule for the 1992 Republican primary election. The State again refused to do so. The RPA filed a second action in the District Court, *Zawacki v. State*, A92-414 CV (D. Alaska 1992). In *Zawacki*, the Honorable James K. Singleton announced a tentative decision that, under *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), the Alaska blanket primary statute infringed on the RPA's right to free political association (App. 3-4), and that the Lieutenant Governor had the authority pursuant to *Tashjian* to implement regulations contrary to statute to protect the RPA's right to free political association. Based on Judge Singleton's tentative decision, the parties in *Zawacki* were able to stipulate that the 1992 Republican primary election would be conducted in accord with the RPA rule. The State adopted temporary regulations for the 1992 primary election, and permanent regulations for the 1994 primary election. 6 AAC 28.100 - .150. The 1992 and 1994 primary elections were conducted pursuant to the RPA rule and these regulations.[2]

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[2] The State has continued to refuse to implement Article XIV, Sections 2, 3, and 5 of the RPA rules. App. 51-53. The RPA is presently seeking the implementation of Sections 3 and 5 in *Ross v. State of Alaska*, United States District Court for the District of Alaska, Case No. A95-0053 CV (HRH). Section 5, which places a six month prior party registration requirement on candidates, is now particularly important. As the Supreme Court of Alaska

Mike O'Callaghan, a *pro se* litigant, filed the case at bench in the Alaska Superior Court challenging the legality of the 1992 and 1994 primary elections. The RPA was not a participant before the trial court. The trial court granted summary judgment in favor of the State, and Mr. O'Callaghan appealed to the Supreme Court of Alaska. After briefing and oral argument on appeal, the Supreme Court of Alaska invited certain organizations, including the RPA, to participate as parties or amicus curiae. *O'Callaghan v. Coghill*, 888 P.2d 1302, 1305-1306 (Alaska 1995). These additional participants were allowed to file supplementary briefs limited to addressing the constitutionality of Alaska's blanket primary statute, and were prohibited from addressing any other issues in the case.[3]

On February 17, 1995, the RPA filed a motion to intervene in the Supreme Court of Alaska, accompanied by a complaint in intervention. The Supreme Court of Alaska allowed the RPA to intervene on February 27, 1995.[4] Originally, the State of Alaska supported the position of the RPA. However, on March 6, 1995, in a memorandum filed with the Supreme Court of Alaska, the

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has prevented the RPA from determining voter qualifications for participation in the Republican primary, it becomes much more important that the RPA should be able to determine candidate qualifications.

[3] Since the RPA did not participate at the trial court level, it was not able to make a factual record. The RPA's presentation of its case was limited to briefing only a single issue before the Supreme Court of Alaska.

[4] The Alaskan Voters for an Open Primary also participated as an intervenor. The Alaskan Independence Party and the Alaska Federation of Natives participated as amici curiae.

State changed its position to support the plaintiffs and defended the constitutionality of the Alaska blanket primary statutes.[5]

Once the State of Alaska changed its position, the RPA was the only party defending the RPA rule and State regulations. On March 9, 1995, the RPA timely removed this case to the United States District Court as *O'Callaghan v. Coghill*, Case No. A95-0087 CV (HRH). The State of Alaska, the Alaskan Voters For An Open Primary, and Mike O'Callaghan filed motions to remand. The District Court remanded this case to the Supreme Court of Alaska on June 29, 1995.[6]

The first opinion of the Supreme Court of Alaska was issued on March 20, 1996. This opinion was withdrawn, and a revised opinion was issued on April 12, 1996. App. 1-43.[7] By a three to one decision, the Supreme Court of

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[5] In effect, by changing its position, the State of Alaska unilaterally repudiated its agreement with the RPA pursuant to which the 1992 federal litigation was resolved, and the Republican primary election implemented. The governor of Alaska in 1992 was a member of the Alaskan Independence Party. The governor at the time of the 1995 repudiation was a Democrat. The First Amendment right of the RPA to free political association fell victim to the politics of the moment.

[6] The RPA believed that the remand order was incorrect as a matter of law, but had no remedy. The remand order was not reviewable on appeal or otherwise. 28 U.S.C. § 1447(d).

[7] The difference between these opinions is that the first opinion directed a remand for the entry of a declaratory judgment by the Superior Court, while the current opinion contains the entry of a declaratory judgment by the Supreme Court of Alaska itself.

Alaska held that Alaska's blanket primary statute is constitutional, and that any interference between Alaska's blanket primary statute and the RPA's rights of free political association is minor and justified by the State's interests. In reaching this decision, the majority opinion placed the burden of proof on the RPA to show a substantial burden to its associational rights. *Heavey v. Chapman*, 611 P.2d 1256 (Wash. 1980). However, notwithstanding the fact that the majority placed the burden of proof on the RPA, the majority did not afford the RPA any opportunity to make a factual record before the trial court.[8]

Justice Jay A. Rabinowitz, in a correct and well-reasoned dissent (App. 33-43), would have placed the burden on the State of Alaska to demonstrate compelling reasons for limiting the associational rights of the RPA. As the State had failed to demonstrate any such compelling reasons, Justice Rabinowitz concluded that the Alaska blanket primary statute is unconstitutional under the First and Fourteenth Amendments to the United States Constitution. App. 42-43.

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[8] The RPA pointed out to the Alaska Supreme Court that it was necessary for a remand to develop factual issues if the Court was going to abrogate the RPA's right to free political association. App. 25, n.16.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT OF ALASKA HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND A PRIOR DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, AND IS INCORRECT AS A MATTER OF FEDERAL CONSTITUTIONAL LAW.

Freedom of association is among the preferred rights derived from the First Amendment guarantees of speech, press, petition and assembly. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Buckley v. Valeo*, 424 U.S. 1 (1976). It is beyond debate that freedom of association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the due process clause of the Fourteenth Amendment. *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 460 (1958).

The Alaska blanket primary statute interferes with the right of the RPA to free political association by preventing the RPA from using its chosen method of selecting candidates to represent the RPA on the general election ballot. Specifically, the Alaska statute requires the RPA to participate in a primary election system in which Democrats and members of other political parties may vote to choose Republican candidates. This procedure violates the rules of the RPA. The RPA is compelled by law to participate in this system, and may not choose its nominees in any other way. App. 37-38.

This Court has made it absolutely clear that the Supreme Court of Alaska must apply strict scrutiny in

determining the constitutionality of Alaska's blanket primary statute. *Burdick v. Takushi*, 504 U.S. 428 (1992), *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and *Democratic Party of the United States v. Wisconsin, ex rel. LaFollette*, 450 U.S. 107 (1981). If a challenged law burdens the right of free political association of a political party and its members, the law can survive constitutional scrutiny only if the State shows that the law advances a compelling State interest and is narrowly tailored to serve that interest. *Burdick v. Takushi*, 504 U.S. 428 (1992), *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989).

This Court has repeatedly held that one of the basic rights of free political association is the right to nominate candidates of the party's choice. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) involved the selection of Republican candidates to run in the general election. The State of Connecticut wanted to keep the candidate selection process closed, while the party wanted to allow certain non-party members to vote. *Democratic Party of the United States v. Wisconsin, ex rel. LaFollette*, 450 U.S. 107 (1981) involved the delegate selection process of a national party for national conventions. The State of Wisconsin wanted to keep the delegate selection process open, while the party wanted to close the process to outsiders. In both *Tashjian* and *LaFollette*, this Court held that the parties' desires prevailed over the states' interest in opening or closing the candidate or delegate selection process. In *LaFollette*, this Court specifically stated:

> It is for the National Party – and not for the Wisconsin Legislature or any court – to determine the appropriate standards for participation in the party's candidate selection process.

LaFollette, 450 U.S. at 124, n.27.

The decision of the majority of the Alaska Supreme Court conflicts with the previously cited decisions of this Court.[9] The majority relied on *Heavey v. Chapman*, 611 P.2d 1256 (Wash. 1980). *Heavey*, a pre-*Tashjian* case, placed the burden on the plaintiffs to show a substantial burden to their associational rights. *Tashjian*, however, places the burden on the State to show a compelling State interest and narrowly-tailored law. Contrary to *Tashjian*, the Alaska majority placed the burden on the RPA to show a substantial burden to its associational rights. The majority decided against the RPA because it did not make such a showing. However, the Court gave the RPA no opportunity to make a record before the trial court.

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) very clearly conflicts with the majority decision in other ways. In distinguishing *Tashjian* from prior cases in which this Court has considered claims by non-members of a party seeking to vote in that party's primary despite the party's opposition, the *Tashjian* majority stated that in the class of cases where there is an element of potential interference with the rights of party members, the non-members desire to participate in the party's affairs is overborne by the countervailing and legitimate right of

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[9] The dissenting opinion of Justice Rabinowitz is correct as a matter of federal constitutional law.

the party to determine its own membership qualifications. *Tashjian*, 479 U.S. at 215, n.6 *citing Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn.), *summarily aff'd*, 429 U.S. 989 (1976). This principle applies equally to *Tashjian* and the case at bench. In both *Tashjian* and the case at bench, the qualified voters can generally be classified as Republican Party members and independent voters. Under both the Connecticut and Alaska rules, only registered members of other political parties are excluded from participating in the respective primary elections.

Concerns raised in the dissenting opinions in *Tashjian* are not applicable to the case at bench. The dissenting opinion of Justice Stevens, joined by Justice Scalia, deals with the voter qualifications clauses of the United States Constitution. This concern is not present in the case at bench. Alaska has a statewide voter registration system, and every person who is qualified to vote in a federal election for a member of the House of Representatives or for a United States Senator is also qualified to vote for candidates to the Alaska House of Representatives.

The dissenting opinion of Justice Scalia, joined by Chief Justice Rehnquist and Justice O'Connor, questioned the extension of the concept of free political association to the casual contact of an independent voter casting a vote in the Republican Party primary election. The right of free political association is very clearly applicable, however, where the State requires the RPA to accept registered political opponents as voters in its primary election. Justice Scalia also questioned the propriety of a process that permits the members votes to be diluted by the votes of outsiders. By excluding the votes of Democrats and

members of other political parties, the RPA corrected a more serious dilution of its members' votes that had existed in the past.

The alleged State interests cited by the Alaska majority do not justify the State's infringement on the RPA's associational rights. First, the majority cites three justifications from *Heavey v. Chapman*, 611 P.2d 1112 (Wash. 1980). These are (1) secrecy, by allowing each voter to keep party identification, if any, secret; (2) greater voter participation by allowing the broadest possible participation in the primary election; and (3) maximizing voter choice by giving each voter a free choice among all candidates in the primary. App. 14-15.

Secrecy is not a valid justification. In Alaska, each registered voter's party identification, if any, is a matter of public record available for public inspection. Greater voter participation is not necessarily encouraged by a blanket open primary election. In fact, voter participation would logically increase in "closed" party primary elections because the primary elections would be a more meaningful method of choosing candidates. Finally, maximizing voter choice is an interest which is applicable to the general election. Voters in a primary election should not be allowed to freely choose among candidates of an opposing party, because the purpose of the primary election is for each party to select its candidates in its chosen manner.

The Alaska majority opinion also holds that the State has a legitimate interest in forcing the major political parties to have a broad cross-section of support from the voters, by forcing the parties to accept voters of opposing

political parties in their primary elections. App. 27. The majority observes that in Alaska, where a majority of the voters are not affiliated with any party, a closed or partially closed primary system can be viewed as bestowing a disproportionately powerful role in the selection of public office holders on a minority of the electorate, and that this is power taken from unaffiliated voters. App. 29. This is nonsense as a matter of Constitutional law, and is not even involved in the case at bench. The right of individuals who organize should not be abrogated in order to strengthen the political power of the unaffiliated. Political power of those individuals who care enough to actively participate in the political process should not be destroyed. This alleged dilution of the power of the unaffiliated would not occur under the RPA rules. The RPA rules allow unaffiliated voters to participate in the Republican primary election. The only political power lost when the RPA rule was implemented was the power of Democrats and members of other political parties to interfere in the Republican primary election.

The decision of the Supreme Court of Alaska also conflicts with the 1992 tentative decision in *Zawacki v. State*, A92-414 CV (D. Alaska 1992). In his tentative decision, Judge Singleton correctly relied on *Tashjian*, stating that the Alaska blanket primary statute infringed the RPA's associational rights (App. 3-4) and that the Lieutenant Governor had the authority to promulgate regulations implementing the principles enunciated in *Tashjian*. Judge Singleton's tentative decision was the basis for the stipulation to conduct the 1992 Republican primary in accord with the RPA Rule.

The right to free political association of the RPA has been violated in a manner contrary to prior decisions of this Court and the United States District Court for the District of Alaska. The decision of the majority of the Supreme Court of Alaska is wrong on an important matter of federal constitutional law. This petition for certiorari should be granted in order to correct the decision of the Supreme Court of Alaska on a crucial federal constitutional right to conform to prior decisions of this Court.

II. REQUIRING THE RPA TO ALLOW DEMOCRATS AND MEMBERS OF OTHER POLITICAL PARTIES TO SELECT REPUBLICAN CANDIDATES SEVERELY HARMS THE RIGHT TO FREE POLITICAL ASSOCIATION OF THE RPA AND ITS MEMBERS.

Individuals organize into political parties for the purpose of nominating and electing candidates to represent the individuals' principles and goals. The basic purpose of a political party is to elect candidates to public office. Selection of candidates is the very essence of political expression. Candidate selection translates the appeal to common principles and objectives into concerted action to advance these principles and attain these goals. Nothing is more basic to this right than that the parties themselves determine the manner by which their candidates shall be selected and who may participate.

The first major purpose of the RPA in changing its primary election process was to prevent the Democrats from selecting the weakest Republican candidate in the Republican primary election, so that the Democrats could

defeat the weak Republican candidate in the general election. A system which allows party members to select the worst candidates of the opposing party to be candidates in the general election does not lead to good candidates being selected, nor to good government.

A classic example of the cross-over problem was the Alaska primary election in 1984 for House District 14, Seat A. The only Democratic candidate was James Duncan. Ramona Barnes and Marco Pignalberi were the two Republican candidates. Ramona Barnes, the incumbent, was a senior legislator, and the leader of the Republicans in the Alaska House of Representatives. As such, she was a top Democratic target. In the blanket primary, James Duncan received only 329 votes. Marco Pignalberi defeated Ramona Barnes by a vote of 2816 to 1819. The extremely low number of voters in the Democratic primary election shows a massive Democratic cross-over which defeated the House Republican leader.

In the 1990 primary election for Senate District F-B, no candidate ran as a Democrat. The Republican candidates were Jan Faiks, former Republican Senate President, and Virginia Collins, a Republican member of the House of Representatives. Jan Faiks, a Republican leader, was a Democratic target. Since the Democrats did not field a candidate, almost all Democrats crossed-over into the Republican primary election, resulting in Jan Faiks' defeat by a 53% to 47% voting margin.

Cross-over voters also affected the election for governor of Alaska in 1978. Democratic voters crossing into the Republican primary election allowed Jay Hammond, a Republican legislator, to defeat Walter J. Hickel, former

Secretary of the United States Department of the Interior and former Governor of Alaska. In the 1978 gubernatorial primary election, 24,675 individuals voted for Democrats and 81,632 persons voted for Republicans. Again, the low number of voters in the Democratic primary shows a massive cross-over of Democrats into the Republican primary election.

Democrats also crossed into the Republican primary election for United States senator in 1974. Mike Gravel was the only Democratic candidate. The two Republican candidates were C.R. Lewis, a leader of the John Birch Society, and Terry Miller, a moderate. Democratic cross-over voters gave C.R. Lewis the victory in the Republican primary election. As an extreme conservative, Mr. Lewis was unacceptable to most of the electorate. Mike Gravel, the Democrat, then won the general election.

Mike Gravel, the incumbent, and Clark Gruening were the two Democratic candidates in the 1980 United States Senate race. A Republican cross-over vote resulted in Clark Gruening defeating Mike Gravel. The Republican candidate, Frank Murkowski, then won the general election, and presently serves in the United States Senate. In this election, 72,368 persons voted Democratic, while only 27,632 persons voted Republican. There were six Republican candidates in that primary election. Nevertheless, Republicans crossed over into the Democratic primary election in order to defeat the incumbent senator, Mike Gravel.

A comparison of the vote in the 1980 senatorial primary with the vote in the 1978 gubernatorial primary, illustrates the magnitude of cross-over voting:

Primary Election	Republican	Democrat
1978 Gubernatorial	81,632	24,675
1980 U.S. Senate	27,632	72,368

The RPA had solved the cross-over voting problem by adopting rules to exclude declared political opponents from the Republican primary. However, the RPA can no longer do so, and Alaska has returned to the system whereby party members may select the weakest candidate of the opposing party to represent the opposing party in the general election.

A second major purpose of the RPA primary election rules is to prevent elected Republican legislators from abandoning their Republican colleagues by joining leadership coalitions dominated by Democrats. In the 1990 election, the last year of the blanket primary, enough Republicans were elected to form a Republican majority in the Alaska Senate. However, certain Republicans desired benefits for themselves, which they might not have received from the Republican majority. Accordingly, three Republican legislators abandoned their Republican colleagues and entered into a coalition dominated by Democrats in order to obtain leadership roles for themselves.

As the new RPA rule was in place for the 1992 Republican primary, none of the three 1990 defectors were re-nominated as Republicans. Democrats could not reward the Republican defectors with votes in the Republican primary. Republican voters elected other candidates, and there has not been a defection since. In fact, largely because of the discipline imposed by the primary rule, Republican legislators have been in the majority in both

the Alaska House and Senate since the rule was implemented.

The right of the RPA to exclude Democrats and members of other political parties from its primary election is also crucial for another reason. Many elections in Alaska are decided by very close margins. For example, present governor Tony Knowles was elected by a plurality vote of approximately one vote per precinct in the 1994 Alaska gubernatorial election. In a state where close elections are the norm, allowing the 23% of voters who are declared political opponents of the RPA into the Republican primary election allows these opponents an unusual power to adversely affect the Republican outcome.

The Republican Party firmly believes that Republican legislators do a better job when they are evaluated in the next primary election by Republican and independent voters. There is much less incentive for a Republican legislator to adhere to the precepts of the Republican Party when the legislator is being evaluated by a group which includes a substantial number of Democrats and other political party members.

The Republican Party did not make these changes in its primary election process lightly or arbitrarily. The Republican Party believes that these changes will lead to politicians acting in a more responsible manner and acting in a manner more responsive to their constituents. Hopefully, this will lead to better government. This principle is crucial to Republican politics, and the continuation of a partially closed Republican primary is necessary to accomplish this goal. Republican primary elections, or

Democrat or other party primary elections for that matter, should not be decided by voters of an opposing party.

The blanket primary statute of Alaska forces the RPA to affiliate politically with registered voters of other political parties for the purpose of selecting candidates to represent the Republican Party in the general election. If the right to free political association means *anything*, it means *at least* that the RPA has the right to exclude "the enemy" from its candidate selection process. The nature of the constitutional right involved, the infringement on it, and the severe harm to the RPA require that this Court grant this petition for certiorari and protect the right of the RPA and its members to free political association.

III. THIS CASE IS CRUCIALLY IMPORTANT TO OTHER STATES.

The primary election laws of at least two other states, Virginia and California, will be the subject of future judicial proceedings seeking to void those state laws on the ground that the political parties' rights to free political association have been infringed. Any decision by this Court in the case at bench will greatly impact future primary election/free political association litigation.

Primary election/free political association litigation already exists in Virginia. *Marshall v. Meadows*, 3:96CV208 (E.D. Va. 1996), was filed on March 8, 1996. The plaintiffs in *Marshall* were Robert G. Marshall and Patrick M. McSweeney. Mr. Marshall is a member of the Republican Party of Virginia and the incumbent delegate representing House of Delegates Election District 13 in the Virginia

General Assembly. Mr. McSweeney is a member and was then the chairman of the Republican Party of Virginia.

The plaintiffs sought an order, enjoining the defendant members of the Virginia State Board of Elections from enforcing Section 24.2-530 of the Code of Virginia. Plaintiffs urged that the Virginia law is unconstitutional on its face and in its application to them because it unlawfully infringes on their rights to associate freely with other citizens for the advancement of shared political objectives, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. The complaint alleged that the law of Virginia required the Republican Party of Virginia to open its primary nomination process to individuals who do not meet the party's qualification for participation in the selection of the party's candidates.

On April 17, 1996, the District Court dismissed the Virginia litigation holding that the plaintiffs lacked standing, failed to show a redressable injury, and were barred by laches. The action had been brought by individuals rather than by the Republican Party of Virginia. The primary election had actually been authorized by the Party. Laches was applicable, because the plaintiffs knew for approximately one year that the incumbent senator intended to seek renomination by primary election. The litigation was filed only 95 days before the date that the Republican primary was to be held. In its dismissal, the District Court did not address the merits of the case. Despite the dismissal, the Virginia litigation is not yet over. The Virginia plaintiffs intend to continue litigation to obtain a decision on the merits, but in a manner that

takes the case beyond the Virginia Senatorial primary of June 11, 1996.[10]

The voters of California adopted Initiative Proposition 198 on March 26, 1996. This proposition provides for a blanket open primary election in California. The bylaws of the Republican Party of California permit only registered Republicans to vote in its primary election. The Democratic Party of California is expected to act within the month to close its primary election.[11] California's major political parties will mount a legal challenge to this proposition. However, since the first California election to be affected by this proposition will not take place until 1998, litigation will not be filed immediately. At the present time, California political attorneys are closely monitoring the Alaskan case at bench. *The Seiler Report*, March 31, 1996, at 4 (a newsletter of California elections).

The future California case is identical to the case at bench in that it also presents the issue of whether the First Amendment protects the right of a political party to prevent its political opponents from participating in the selection of the party's candidates for public office. The California case will involve an enacted initiative provision. However, a voting majority has no greater right to abrogate First Amendment rights than a state has to legislate them away.

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[10] Letter from Daniel A. Carrell, attorney for plaintiffs, to Kenneth P. Jacobus, dated May 7, 1996.

[11] Telephone conversation: Kenneth P. Jacobus to George Waters, an attorney for the Democratic Party of California, May 22, 1996.

This petition for certiorari should be granted for the additional reason that the decision of the Supreme Court of Alaska will be cited as bad precedent in future Virginia and California litigation. This decision must be corrected as soon as possible, so that future litigation in other jurisdictions is not contaminated by law which incorrectly limits the First Amendment right to free political association.[12]

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[12] A denial of a petition for a writ of certiorari ordinarily carries with it no implication regarding this Court's view on the merits of the case. The sole significance of such a denial is that fewer than four members of the Court deem it desirable as a matter of sound judicial discretion to review a decision of a lower court. *State of Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950). However, a denial of the petition in the case at bench will be interpreted as a decision on the merits.

This is a classic case in which certiorari should be granted. It is brought by a major political party. It involves a severe infringement of a First Amendment Constitutional right, in a manner which conflicts with prior decisions of this Court. The infringement harms many thousands of Alaskan Republicans, as well as those independent voters who support Republican principles and candidates. The case at bench will substantially affect, if not control, future litigation in Virginia and California. Finally, this case involves none of the other factors, such as technical requirements or a cloudy record, which are referenced by Justice Frankfurter in *Baltimore Radio Show* to suggest other reasons for the denial of a petition for certiorari. 338 U.S. at 917-918.

IV. THE RPA HAS DETERMINED TO PRIVATELY SELECT ITS CANDIDATES IN 1996, WHICH NECESSARILY INVOLVES FURTHER FEDERAL LITIGATION AND WILL CAST SEVERE DOUBT AND CONFUSION UPON THE ALASKA 1996 STATUTORY PRIMARY.

At its most recent state convention, on April 25, and 26, 1996, the RPA reaffirmed its commitment to the RPA Primary Election Rules. It is totally unacceptable to the RPA to have Democrats and members of other political parties participating in its candidate selection process. On May 20, 1996, the executive committee of the RPA determined to proceed with a privately conducted primary election, in accordance with RPA rules, using mail-in ballots. This procedure is not authorized by Alaska Statute. The mail-in Republican primary election will take place only if this Court does not reverse or stay the decision of the Supreme Court of Alaska, such that the 1996 Republican primary election can be conducted according to RPA Rules.

The RPA has filed an application with the United States Department of Justice for preclearance of the mail-in Republican primary election. Additionally, the RPA intends to immediately file an action in the United States District Court for the District of Alaska requesting that the State be required to accept the candidates selected in this privately conducted primary election as the candidates of the RPA to be included on the 1996 general election ballot. This procedure will necessarily cast considerable doubt and confusion into the 1996 Alaska elections. However, the Republican Party has no choice. It

must now institute a privately conducted primary election in order to protect its right to free political association. The RPA prefers that its primary election be conducted in the same way it was conducted in 1992 and 1994, but must protect its right to free political association in the event that this is not possible.

The petition for certiorari should be granted by this Court in order to avoid the necessity of further proceedings before the United States Department of Justice and the United States District Court, and the confusion and doubt that these proceedings will raise in the 1996 Alaska elections.

V. PROTECTING THE FIRST AMENDMENT RIGHT OF THE RPA AND ITS MEMBERS TO FREE POLITICAL ASSOCIATION IS EASILY ACCOMPLISHED.

The majority opinion of the Supreme Court of Alaska is clearly wrong. If the right to free political association under the First Amendment to the United States Constitution means *anything*, it means *at least* that the RPA has the right to exclude members of other political parties from participating in the RPA's candidate selection process. The opinion of the Supreme Court of Alaska contains a correct and well-reasoned dissent by Justice Jay A. Rabinowitz. Finally, the law relating to the right to determine who may participate in a party's candidate selection process has been determined in various prior decisions of this Court.

This Court can easily correct the infringement of the RPA's associational rights imposed by the Alaska blanket

primary statute and the majority opinion of the Supreme Court of Alaska. This Court should grant this petition for writ of certiorari, summarily reverse the decision of the Supreme Court of Alaska, and adopt the dissenting opinion of Justice Rabinowitz as the opinion of this Court. The law in this area is so clear, and the damage done to the associational rights of the RPA and its members so obvious and palpable, that further briefing is not necessary.

CONCLUSION

The petition for writ of certiorari should be granted, the majority opinion of the Supreme Court of Alaska summarily reversed, and the dissenting opinion of Justice Jay A. Rabinowitz adopted as the opinion of this Court.

This should be done on an expedited basis, because the Alaskan primary election candidate filing deadline is June 1, 1996, the Alaskan primary elections will take place on August 27, 1996, and the right to free political association of the RPA and its members needs to be protected for the 1996 primary and general elections.

Respectfully submitted,

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Notice: This opinion is subject to correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0607, fax (907) 276-5808.

THE SUPREME COURT OF THE STATE OF ALASKA

MIKE O'CALLAGHAN, Appellant, and JED WHITTAKER, ROBERT GIGLER, and ALASKAN VOTERS FOR AN OPEN PRIMARY, Appellants/ Intervenors, v. STATE OF ALASKA; LIEUTENANT GOVERNOR JACK COGHILL, in his official capacity as Lieutenant Governor, Appellee, and REPUBLICAN PARTY OF ALASKA, Appellee/ Intervenor.	Supreme Court No. S-6249 Superior Court Nos. 3AN-92-08552 CI and 3AN-92-11150 CI (Consolidated) OPINION [No. 4338 – April 12, 1996]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Brian C. Shortell, Judge.

Appearances: Michael O'Callaghan, pro se, Anchorage. Max F. Gruenberg, Jr., Gruenberg & Clover, Anchorage, for Alaskan Voters for an Open Primary. Virginia B. Ragle, James L. Baldwin, Assistant Attorneys General, Bruce M. Botelho, Attorney General, Juneau, for State of Alaska. Kenneth P. Jacobus, Anchorage, for Republican Party of Alaska. Stephan H. Williams, Anchorage, for Amicus Curiae Alaska Federation of Natives. Edgar Paul Boyko, Edgar Paul Boyko & Associates, Anchorage, for Amicus Curiae Alaskan Independence Party.

Before: Rabinowitz, Matthews, Compton and Eastaugh, Justices. [Moore, Chief Justice, not participating.]

MATTHEWS, Justice.
RABINOWITZ, Justice, dissenting.

I. INTRODUCTION

The Alaska Election Code provides for a single "blanket" primary election in which a voter has the right to vote for any candidate, regardless of the party affiliation of the voter or the candidate. AS 15.25.010, et seq. In 1990 the Republican Party of Alaska (RPA) enacted a party rule which provides that only registered Republicans, registered Independents, and registered voters who state no preference of party affiliation may vote "in the Republican primary election. . . . "[1] The question in this case is

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[1] Republican Party Rule XIV § 1.

whether, in light of this rule, the blanket primary violates RPA's freedom of association rights and is thus unconstitutional. We answer this in the negative.

II. FACTUAL AND PROCEDURAL BACKGROUND

We have previously published an Order and Memorandum Opinion in this case, *O'Callaghan v. Coghill*, 888 P.2d 1302 (Alaska 1995), in which the underlying facts and proceedings are stated. We summarize them briefly here.

After adopting the party rule noted above, RPA sued the State in federal court, challenging the constitutionality of the statutory blanket primary system. *Zawacki v. State*, A92-414 CV (D. Alaska 1992).

United States District Court Judge James Singleton orally announced his tentative decision[2] that under Tashjian v. Republican Party of Connecticut, 479 U.S. 208

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[2] Judge Singleton explained his practice of announcing tentative decisions as follows:

> The important thing about a tentative decision is to alert you to the conclusions that I have reached legally and factually after reviewing your materials and the factual materials you have submitted in support of the memorandum. . . . So, again by announcing tentative decisions I am not suggesting that my mind is fixed in stone or that I am absolutely invulnerable to persuasion but only to suggest to you any factual or legal errors I may be laboring under so that in the course of your argument you can correct them.

(1986), the blanket primary infringed on RPA's associational rights.[3] Following Judge Singleton's tentative decision the parties stipulated that the lieutenant governor would adopt regulations which would provide for two separate ballots for primary elections.[4] A party rule ballot would contain the names of candidates who filed for the RPA nomination and would be available to Republican, nonpartisan, and undeclared voters. A statutory ballot would contain the names of candidates of all other political parties and would be available to all voters. A voter could vote only one ballot. The 1992 and 1994 primary elections were held under such regulations. *See* 6 AAC 28.100-150.

Mike O'Callaghan, acting without an attorney, filed suit in state superior court challenging the legality of the 1992 primary on the ground that the stipulated regulations were inconsistent with the election statutes. The superior court granted summary judgment in favor of the State.[5] On appeal we ruled that "a stipulation or consent

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[3] The court found that "federal law under the U. S. Constitution substantially restricts the state's power to . . . burden the exercise of the party's administrative rights . . . [including] the right to structure the manner in which their political candidates will be selected and to determine who participates in that selection procedure." However, Judge Singleton declined to issue a preliminary injunction, indicating that while the State could be compelled to eliminate all RPA candidates from the blanket primary, it could not be compelled to implement and pay for a primary designed by RPA.

[4] The United States District Court entered an order approving the stipulation.

[5] The State argued that "the challenged regulations are valid because they 'were properly adopted in accordance with a

judgment declaring a law unconstitutional is not valid" except in cases of clear unconstitutionality. *O'Callaghan*, 888 P.2d at 1303. We concluded that the standard of clear unconstitutionality had not been met. Further, we found that the briefing was inadequate to determine the constitutionality of the blanket primary and ordered additional briefing. In view of the importance of this case we invited participation by the political parties of Alaska and others. *Id.* at 1305.

O'Callaghan and the State of Alaska submitted supplemental briefs. The State changed its position and now defends the constitutionality of the blanket primary. The court granted RPA's motion to intervene. Alaskan Voters for an Open Primary (AVOP) were also allowed to intervene. The Alaska Federation of Natives filed an *amicus curiae* brief, and the Alaskan Independence Party filed a submission in lieu of an *amicus curiae* brief. At this point only RPA argues that the blanket primary is unconstitutional, while the other parties defend the blanket primary's constitutionality.

III. STANDARD OF REVIEW

In *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court outlined the approach courts must take in cases in

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stipulation sanctioned by the United States District Court.' " *O'Callaghan*, 888 P.2d at 1303.

which election laws are challenged as violative of associational and voter rights. The Court noted:

> It is beyond cavil that "voting is of the most fundamental significance under our constitutional structure." . . . It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. . . . The Constitution provides that States may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl.1, and the Court therefore has recognized that States retain the power to regulate their own elections. . . . Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." . . .
>
> Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends." . . . Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. . . . Accordingly, the mere fact that a

> State's system "creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny." . . .
>
> Instead, . . . a more flexible standard applies. A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." . . .
>
> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." . . . But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. . . .

Id. at 433-34 (citations omitted).

In evaluating interests underlying state election laws "a particularized showing" is not required. *Munro v. Socialist Workers' Party*, 479 U.S. 189, 195-96 (1986):

> To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshalled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

IV. ALASKA'S BLANKET PRIMARY AND VOTER REGISTRATION PATTERNS

A discussion of the constitutionality of state primary elections must begin with an explanation of the three major types of primary election systems. They are the closed primary, the open primary, and the blanket or nonpartisan primary. The defining feature of a closed primary is that only members of a given political party may participate in the party's primary election. Some closed primaries require affiliation with the party for a period of time prior to the primary election, while in others a voter may declare an affiliation at the time of voting in the primary. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 222 n.11 (1986). In an open primary, any voter may vote for candidates for any party's nomination, but the voter may only vote for candidates running for one party's nomination. *Id.* In a blanket primary,

any voter may also vote for candidates for any party's nomination, but the voter may vote for candidates for the nomination of different political parties for various offices. *Id.* Thus, in Alaska's blanket primary a registered Republican might vote for an Alaskan Independence Party candidate for Governor, a Republican for United States House of Representatives, and a Democrat for State Senate. In 1986 the United States Supreme Court identified thirty-seven states with closed primaries of one sort or another, nine states with open primaries, and four states, including Alaska, with blanket primaries, called by the Supreme Court "nonpartisan" primaries. *Id.*

The RPA primary conducted under the stipulation in *Zawacki* is referred to by RPA as a "partially-closed primary." This seems apt since the primary is not a classic closed primary in that unaffiliated voters are allowed to participate, yet it does not meet the definition of an open primary, since it is not open to all registered voters.

Under the blanket primary system, Alaska's political parties have no formal role in the selection of candidates for the general election.[6,7] Any person may declare him or

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[6] There are two exceptions to this. When an incumbent dies or is disqualified before the primary election, or a nominee dies, withdraws, or is disqualified before the general election, ballot vacancies may be filled by party petition. AS 15.25.056, AS 15.25.110.

[7] That the Alaska Statutes do not entrust candidate selection to political parties is consistent with the scant attention given political parties in the Alaska Constitution. They are mentioned only twice, both in a limiting context. Art. IV, § 14 (justices and judges may not hold office in a political party); art. XII, § 4 (no person who belongs to any party which advocates

herself to be a candidate of a party in the primary election upon meeting certain prescribed legal requirements. The candidate must be "a member of the political party." This, by definition, "means a person who supports the political program of a party." AS 15.60.010(15). The candidate must be registered to vote as a member of the political party under whose name the candidate seeks nomination. AS 15.25.030(16). Registration can be accomplished on the day of the declaration. AS 15.07.040. All the candidates for a given office are listed on a single ballot with their party affiliation. Any voter, regardless of party affiliation, may vote for any candidate. Where there are two or more candidates seeking nomination under a single party's name, the candidate who receives the most votes advances to the general election.[8,9]

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the overthrow by force or violence of the government is qualified to hold any public office).

[8] Political parties have automatic access to the blanket primary ballot. A political party is defined as "an organized group of voters that represents a political program and that nominated a candidate for governor who received at least three percent of the total votes cast at the preceding general election for governor. . . . AS 15.60.010(20). In 1992, Alaska had four political parties, RPA, the Democratic Party of Alaska, the Alaskan Independence Party, and the Green Party. The smaller parties sometimes play an important role in Alaska politics. For example, in 1992 the incumbent governor was the nominee of the Alaskan Independence Party.

[9] Candidates may gain access to the general election ballot by becoming the nominee of a party in the blanket primary or, in 1992, by petition. AS 15.25.140-.200 (1992). Effective in 1995, candidates of a political "group" – an organization which represents a political program and which does not qualify as a party, AS 15.60.010(19) – may gain access to the blanket primary ballot by petition. AS 15.25.190 (1995).

The blanket primary was first enacted in Alaska in 1947 following a referendum. Memorandum from Gordon S. Harrison, Director, Legislative Research Agency, Research Request 90.294 (May 23, 1990). The subsequent history of the blanket primary is related by Harrison:

> Increasingly, . . . the question of the blanket primary became a partisan issue. Democrats tended to oppose it; Republicans to support it. Democrats believed that it eroded what little party loyalty and discipline existed in Alaska, and they thought the Republicans used it to their advantage by crossing party lines in the primary to elect the weakest Democratic candidate. Republicans supported the blanket primary in hopes that Republican candidates would benefit by attracting conservative Democrats and nonaligned voters.
>
> Despite the overall partisan flavor that the issue was to acquire (with Republicans for and Democrats against the blanket primary), opposition existed on the part of some Republicans, and support existed on the part of some Democrats. In general, party stalwarts and those who believe in the importance of strong parties in the political process, opposed and continue to oppose the blanket primary. Those who are not firmly aligned with a political party, and who believe that the voter should have maximum independence in balloting matters, support the blanket primary. Party loyalty has not been strong in Alaska, and legislators from both parties have responded to widespread public support for the blanket primary.
>
> In the first session of the first state legislature in 1959, when Democrats firmly controlled both

houses and the governor's office, the blanket primary was replaced by the single ballot open primary. Adoption of the comprehensive election code in 1960 incorporated this change.

Republicans led the opposition to the single ballot open primary, although many Democrats also sought a return to the blanket primary. Several bills were introduced to restore the blanket primary, but they languished in Democratic-controlled committees. In 1966, during the second session of the Fourth Legislature, a blanket primary bill passed the House and almost passed the Senate. Senate debate on the measure was reported in the *Anchorage Daily Times*. Democrats Jim Nolan of Wrangell, Robert Blodgett of Teller, and Robert Ziegler of Ketchikan spoke in favor the bill. Senator Blodgett is quoted saying:

> The Democratic party is a hollow shell. The Republican party is a hollow shell. How many people actually are active workers in the two parties? Darned few. I support the bill.

Senator Ziegler is reported to have said:

> The measure is vitally important to the people of this state. In Ketchikan, probably nine of every ten voters want to vote for the man, not the party.

Despite this bipartisan show of support, the bill failed to pass the Senate.

The general election of 1966 broke the Democratic monopoly on legislative power which had existed since the 1950s: Republican majorities were elected to both Houses and Republican Walter Hickel was elected governor.

> The blanket primary was thereupon restored during the first session of the Fifth Legislature. The bill to restore the blanket primary was introduced at the request of Governor Hickel, but it attracted considerable bipartisan support. Among the 35 yeas in the House, nine were cast by Democrats; of the five nays, four were cast by Democrats. In the Senate the bill received 18 yeas, four of which were cast by Democrats. Both nays in the Senate were cast by Democrats.
>
> The blanket primary seems to suit Alaska, where party ties and party organizations are weak. However, some Democratic and Republican party loyalists, who lament the decline of political parties, prefer a more conventional (open or closed) primary that restricts voters to casting ballots for one party's candidates.

Id. (footnotes omitted).

In 1994[10] there were 340,464 registered voters in Alaska. Of these more than 182,000 voters were registered as nonpartisan or undeclared. By contrast, there were 78,212 registered Republicans, 59,782 registered Democrats, 12,936 registered Alaskan Independence Party members, 2,558 Green Party members, and 4,595 "other" party members. Thus approximately fifty-four percent of all registered voters in Alaska were nonpartisan or undeclared, whereas approximately twenty-three percent were registered Republicans and approximately eighteen percent were registered Democrats.

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[10] We quote 1994 figures because they are the figures used by the parties in their briefs. The 1992 figures do not differ significantly in the relative distribution of registered voters.

V. THE MERITS

A. Relevant Case Law

We turn now to a discussion of the major cases on which the parties rely. Most directly on point from a factual standpoint is *Heavey v. Chapman*, 611 P.2d 1256 (Wash. 1980). In *Heavey*, the Supreme Court of Washington affirmed the constitutional validity of Washington's blanket primary against a challenge by the State Democratic Central Committee on freedom of association grounds. The Washington court considered two recent United States Supreme Court cases, *Rosario v. Rockefeller*, 410 U.S. 752 (1973) and *Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn.), *aff'd*, 429 U.S. 989 (1976). In both of those cases the United States Supreme Court upheld statutes establishing closed primary elections against challenges brought by excluded voters. The *Heavey* court pointed out that these cases did not "establish any mandatory duty that a state must have closed primaries nor do they forbid a blanket primary." 611 P.2d at 1259 (emphasis omitted). The court quoted language from Nader which implies that primary systems which permit members of other parties to vote in a party's primary are constitutional: " '[Other states] have provision [sic] for primaries which allow participation by independents and members of other parties. There is no suggestion that such a clause makes the election laws unconstitutional . . . ' " *Id.* at 1258 (quoting *Nader*, 417 F. Supp. at 849-50).

While the *Heavey* court found the plaintiffs failed to show a substantial burden to their associational rights, it found that there were compelling interests which supported the blanket primary. It identified three: (1) secrecy

– "allowing each voter to keep party identification, if any, secret"; (2) greater voter participation – "allowing the broadest possible participation in the primary election"; and (3) maximizing voter choice – "giving each voter a free choice among all candidates in the primary." *Id.* at 1259.

Subsequent to the Washington Supreme Court's decision in *Heavey* the United States Supreme Court ruled on one aspect of a state's open presidential preference primary in *Democratic Party of the United States v. Wisconsin ex rel. LaFollette,* 450 U.S. 107 (1981). Under Wisconsin's election statute non-Democrats, including members of other parties and independents, were allowed to participate in the Democratic Party presidential candidate preference primary. *LaFollette,* 450 U.S. at 109-10. Voters did not vote for delegates to the national convention; delegates were chosen at party caucuses. However, Wisconsin law required that the delegates be bound by the results of the open primary. Democratic National Party rules, on the other hand, required that only closed primaries could bind delegates to vote for a particular candidate. The State of Wisconsin sought a declaration that the Wisconsin delegate selection system was constitutional and binding on the Democratic National Party. The Wisconsin Supreme Court held that the state's system was constitutional and binding on the National Party. *Democratic Party of United States v. Wisconsin ex rel. LaFollette,* 287 N.W.2d 519 (Wis. 1980), *rev'd,* 450 U.S. 107 (1981). On appeal, the United States Supreme Court defined the issue not as whether Wisconsin might conduct an open primary, but whether "the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the

Party." 450 U.S. at 121. The Court answered this question in the negative. It held that a state may not control how a national party selects its national convention delegates. *Id.* at 126. In so holding, however, the Court acknowledged that the Wisconsin open primary might serve the compelling state interest of encouraging greater voter participation:

> The Wisconsin Supreme Court considered the question before it to be the constitutionality of the "open" feature of the state primary election law, as such. Concluding that the open primary serves compelling state interest by encouraging voter participation, the court held the state open primary constitutionally valid. *Upon this issue, the Wisconsin Supreme Court may well be correct.*

Id. at 120-21 (emphasis added). Similarly, the Court recited without casting doubt on their validity the interests asserted by the State of Wisconsin as compelling:

> The State asserts a compelling interest in preserving the overall integrity of the electoral process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters. But all those interests go to the conduct of the Presidential preference primary – not to the imposition of voting requirements upon those who, in a separate process, are eventually selected as delegates. . . .
>
> The State has a substantial interest in the manner in which its elections are conducted, and the National Party has a substantial interest

> in the manner in which the delegates to its National Convention are selected.

Id. at 124-26 (footnotes omitted).

The case most heavily relied upon by the RPA is *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). Connecticut had a closed primary. The Republican Party of Connecticut adopted a rule broadening the franchise for Republican Party primaries to include voters who were not registered as members of any other political party. *Tashjian*, 479 U.S. at 210. The party sought a declaration that the Connecticut closed primary statute violated the party's freedom of association. *Id.* The United States District Court issued such a declaration, which was affirmed by the United States Court of Appeals and by the United States Supreme Court. *Id.* at 211. Thus, the Supreme Court found the closed primary statute unconstitutional. The Supreme Court began its discussion with cautionary language, warning against generalization and prescribing a balancing approach:

> We begin from the recognition that "[c]onstitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). "Instead, a court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.

> In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." 460 U.S. at 789.

Id. at 213-14.

Identifying the nature of the party's interest as one of freedom of association, the Court observed that the Connecticut closed primary statute "places limits upon the group of registered voters whom the Party may invite to participate in the 'basic function' of selecting the Party's candidates." *Id.* at 215-16 (citing *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)). For a number of reasons, the Court found these limits were not justified by the reasons offered by the State.

First, the Connecticut closed primary did little to prevent "raiding," since under the statute an Independent could reregister as a Republican and vote in the closed primary as late as the day before the primary election.[11] *Id.* at 219. Second, the closed primary was said to avoid voter confusion since the legislature could determine that " 'it would be difficult for the general public to understand what a candidate stood for who was nominated in part by an unknown amorphous body outside the party, while nevertheless using the party name.' " *Id.* (quoting Brief for Appellant 59). This rationale was found

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[11] The Court defined raiding as the practice " 'whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary.' " 479 U.S. at 219 (quoting *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973)).

to be inconsistent with the facts since any candidate in the Republican primary had to have received at least twenty percent of the vote at a prior party convention. *Id.* at 220-21. Further, the alleged interest in informed voter decisions, while found to be legitimate, was secondary to the benefit to the party of a broader electorate:

> Given the numerical strength of independent voters in the State, one of the questions most likely to occur to Connecticut Republicans in selecting candidates for public office is how can the Party most effectively appeal to the independent voter? By inviting independents to assist in the choice at the polls between primary candidates selected at the Party convention, the Party rule is intended to produce the candidate and platform most likely to achieve that goal. The state statute is said to decrease voter confusion, yet it deprives the Party and its members of the opportunity to inform themselves as to the level of support for the Party's candidates among a critical group of electors.

Id. Finally, the Court stressed that a basic objective of closed primary statutes was to protect parties from external disruption in order to promote responsiveness by elected officials to political parties. The court found this goal to be insubstantial in light of the party's decision that it did not desire such protection:

> The statute in *Storer [v. Brown,* 415 U.S. 724, 736 (1974)] was designed to protect the parties and the party system against the disorganizing effect of independent candidacies launched by unsuccessful putative party nominees. This protection, like that accorded to parties threatened

> by raiding in *Rosario v. Rockefeller* . . . is undertaken to prevent the disruption of the political parties from without and not, as in this case, to prevent the parties from taking internal steps affecting their own process for the selection of candidates. The forms of regulation upheld in *Storer* and *Rosario* imposed certain burdens upon the protected First and Fourteenth Amendment interests of some individuals, both voters and potential candidates, in order to protect the interests of others. In the present case, the state statute is defended on the ground that it protects the integrity of the Party against the Party itself.

Tashjian, 479 U.S. at 224.

B. The Blanket Primary is Not Per Se Unconstitutional

The regulations adopted by Alaska's lieutenant governor following the *Zawacki* stipulation appear to assume that the blanket primary statutory system is per se unconstitutional when it conflicts with party rules regarding the selection of political party candidates.[12] Although

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[12] 6 AAC 28.100 provides in relevant part: "The purpose of this chapter is to provide a means to implement political party rules that violate AS 15.25.060 (the blanket primary statute), but that must be implemented in accordance with a political party's constitutional associational rights." Similarly, 6 AAC 28.150 provides in relevant part: "The director of elections will implement political party rules regarding selection of political party candidates adopted after 10/23/93 that must be implemented in accordance with a political party's constitutional associational rights. . . . "

some commentators have taken a like position,[13] it is not supported by the case law.

Tashjian does not confer per se validity on party rules which conflict with a state's primary election laws. Indeed, it disavows any such scope: "Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership." 479 U.S. at 224 n.13. While *LaFollette* seems to uphold a party rule over a statute, it is distinguishable because the Court did not invalidate the state open primary. The Court in *LaFollette* held that the state could not control the delegate selection process of a national party for national conventions. As one commentator has stated:

> One alternative and quite legitimate interpretation bases . . . *LaFollette* on principles of federalism and extraterritoriality. On this reading, the reason for permitting the decisions of the national convention to prevail over state

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[13] *See, e.g.*, David Lubecky, *Setting Voter Qualifications for State Primary Elections: Reassertion of the Right of State Political Parties to Self-Determination*, 55 U. Cin. L. Rev. 799, 830 (1987) ("When a state political party decides to nominate its candidates for public office in an open or closed primary election contrary to a state law, the fundamental constitutional right of political association mandates that the party's choice of primary form prevail."); Arthur M. Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods*, 57 S. Cal. L. Rev. 213, 281 (1983-84) ("To summarize, statutes compelling parties to choose candidates in primary elections appear to be unconstitutional. The cases make clear that a political association has a first amendment right to determine for itself how it will conduct its affairs. Statutes requiring primaries clearly deny that right.").

> laws is that otherwise inconsistent state requirements could make it difficult for the national party to function or act coherently.

Daniel L. Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 Tex. L. Rev. 1741, 1772 (1993).

Furthermore, post-*Tashjian* decisions have not given *carte blanche* authority to political parties to rewrite state primary election rules. For example, in *Lightfoot v. Eu*, 964 F.2d 865 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993), the court was presented with an assertion by the Libertarian Party of California that the party was entitled to nominate candidates in contravention of the primary election system mandated by state law. The court rejected this position because it was outweighed by the purpose of the direct primary requirement which was to reduce party influence in favor of that of voters:

> The State justifies the direct primary requirement as a Progressive Era reform designed "to take political nominations out of the smoke-filled rooms of party bosses and give them to the voters." The direct primary was one of several measures conceived of by the Progressives to destroy what they viewed as "the corrupt alliance" between wealthy special interests and the political machine. Richard Hofstadter, *The Age of Reform* 257 (Vintage Books 1955). The Progressives believed democracy should be something greater than competition between political parties. *Id.* at 263. They viewed the direct primary as a vital weapon in their battle to "make government accessible to the superior disinterestedness and honesty of the average

> citizen. Then, with the power of the bosses broken or crippled, it would be possible to check the incursions of the interests upon the welfare of the people and realize a cleaner, more efficient government." *Id.* at 257. We can imagine no government interest more compelling. Though honest people may debate the success of the direct primary in producing the kind of government the Progressives envisioned, it is a means sufficiently tailored to its ends to satisfy the Constitution. Indeed, if the goal of California's Progressive reformers was to deliver power over the political process from the hands of party bosses and special interests into those of the people, no measure short of the direct primary would be adequate. We therefore hold that the State's interest in enhancing the democratic character of the election process overrides whatever interest the Party has in designing its own rules for nominating candidates.

964 F.2d at 872-73. The court also observed that the "assertion that 'legislative restrictions on the right of a ballot-qualified political party to adopt its own procedures for self-governance including nomination of candidates constitute a substantial impairment of the rights of the party and its members to freedom of association,' " while finding some support, overstated the breadth of the holdings of the cases on which the assertion was based, including *Tashjian* and *LaFollette*. 964 F.2d at 871.

In *Green Party of California v. Jones*, 37 Cal. Rptr. 2d. 406 (Cal. App. 1995), the Green Party of California had adopted a rule bestowing upon itself the authority to close the primary election for Green Party candidates as

to specified offices. This rule conflicted with the California election code which allowed any qualified member of the party to seek the nomination of the party for any open office. The party asserted the closure right in order to avoid functioning as a "spoiler" in close races between major party candidates. 37 Cal. Rptr. at 410. The court found the Green Party's assertion that it would be injured in its associational interests to be plausible, *id.* at 413, but outweighed by the state's interests "in the uniformity of ballot procedures to prevent voter confusion, to minimize administrative burdens, and to forestall control by party governing bodies." *Id.* at 415.

C. The State's Interests Justify the Restrictions Imposed on RPA's Rights.

RPA claims the right to designate those voters who may vote for Republican candidates in a primary election. The party rule requiring a partially-closed primary election reflects an effort to implement this right. RPA claims that a partially-closed primary advances – and that a blanket primary harms – its interests in two ways. First, it claims that the partially-closed primary is a means by which RPA is able to "protect itself against raiding." Second, RPA contends that the partially-closed primary results in the election of candidates who are more accountable to party "principles and platform" and permit the party "to increase the amount of control [it] would have over elected officials. . . . "[14]

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[14] These mirror two of the interests advanced by the State of Connecticut in its effort to defend the closed primary in *Tashjian*, 479 U.S. at 219-21.

The State and AVOP counter that the harms which RPA identifies are not substantially greater under a blanket primary than they would be under the RPA's partially-closed primary. They point out that under the latter RPA members constitute less than a third of the total eligible voters and thus considerable potential for raiding exists. Further, they note that a voter may change party registration immediately before voting in the partially-closed primary, which also facilitates raiding.[15] The State and AVOP also argue that the loss of candidate accountability to party principles and party direction is not substantially greater under the blanket primary than under the partially-closed primary, given that fewer than a third of the potential voters in the partially-closed primary are RPA members.[16]

In our view there is merit to the State's and AVOP's position that the danger of raiding exists under the partially-closed primary and that the danger is potentially increased only by a matter of degree by a blanket primary. Still, it seems plausible that registered voters in other parties might be more apt than independent or

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[15] AVOP points to language in *Tashjian* in which the Court observed that a Connecticut statute which permitted re-registration on the day before the primary election facilitated raiding. 479 U.S. at 219.

[16] RPA suggests that this case should be remanded for fact finding unless this court rules in RPA's favor. We do not believe that fact finding is necessary or appropriate in this case. The issues are issues of law; the interests advanced in support of and in opposition to the blanket primary are not especially amenable to courtroom proof and such proof is not, in any case, required. *Munro v. Socialist Workers' Party*, 479 U.S. 189, 195-96 (1986).

nonpartisan voters to vote against an opposing party candidate in a primary for tactical reasons. Further, the partially-closed primary deters raiding in one way that the blanket primary does not. A partisan voter who switches party allegiances just before the election in order to cast a raiding vote must give up the right to vote for candidates of his or her choice in races in which he has no desire to raid.

The Supreme Court, writing in *Tashjian* in 1986, quoted from a study which concluded that "the existence of 'raiding' has never been conclusively proven by survey research." 479 U.S. at 219 n.9. We have been referred to no studies contradicting this conclusion. However, we believe that at least on a small scale and in some races some opposition party voters will vote for a candidate whom they have no intention of supporting in the general election.[17] Thus we believe that raiding is a legitimate concern, even though its effects may be exaggerated. Further, while raiding is readily possible under either the partially-closed primary or the blanket primary, more raiding is apt to occur in the latter system.

With respect to the second harm, loss of elected officials' accountability to party principles and party control, the State and AVOP's arguments that this loss is only slightly greater with the expanded franchise of the blanket primary seem correct.

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[17] Of course, some voters will cast primary votes outside their party because they support the candidate for whom they are voting and intend to vote for that candidate in the general election.

Among the reasons offered by the State in support of the blanket primary are that it encourages voter turnout, maximizes voters' freedom of choice among candidates, and tends to ensure that the "officers elected are representative of the people to be governed" in that it "forces the major political parties to have a broad cross-section of support from the voters."[18] These three benefits are seen

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[18] The State's justifications are largely reflected in a resolution passed by the Alaska State Legislature in 1992:

> WHEREAS Alaskans have a proud tradition of freedom and independence and reflect that tradition in the manner in which they exercise their franchise; and
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> WHEREAS in excess of 55 percent of all registered voters in Alaska have chosen not to affiliate with an organized political party; and
>
> WHEREAS this tradition is reflected in the open primary system that has been used since 1968 and is open to all voters, allowing maximum participation and freedom of choice in the electoral process; and
>
> WHEREAS there has been a national decline in voter registration and participation in the electoral process, particularly among young people who are less likely to identify with political parties; and
>
> WHEREAS forcing voters to vote an exclusively partisan ballot that eliminates the current wide range of choices may discourage them from voting; and
>
> WHEREAS Alaska's primary elections already have significantly lower voter turnout than general elections even under an open unrestricted system of voting and this level will likely be even further reduced by a closed primary; and
>
> WHEREAS the State of Alaska and its agencies have a consistent record of encouraging voter registration and participation in elections; and

by the State to have special importance in view of the fact that most voters in Alaska are nonpartisan or undeclared.

The benefits inherent in a blanket primary of greater voter participation and voter free choice among all candidates were recognized by the Washington Supreme Court as compelling in *Heavey*, 611 P.2d at 1259. Voter free choice is better accomplished in a blanket primary than in an open primary:

> [T]he state interest in allowing voters to support the candidates of their choice in a primary can

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> WHEREAS among the stated goals of closing primaries are strengthening parties and providing greater party discipline, both of which run counter to Alaska voting traditions; and
>
> WHEREAS in the current open election process Alaskans have the option of voting for the person they prefer for each separate office, while a closed primary will limit voters' opportunity to vote for the candidates of their choice; and
>
> WHEREAS there will be a significant added cost to the state to print ballots for each separate party primary;
>
> BE IT RESOLVED that the Alaska State Legislature opposes a change to Alaska's open primary election system and affirms support for maintaining our open primary; and be it
>
> FURTHER RESOLVED that the Alaska State Legislature encourages the governing bodies of the political parties to reconsider their decisions to hold separate closed primaries that force limitations and restrictions on Alaska voters.

1992 Legislative Resolve No. 67 (SCR 30). This resolution was passed unanimously in the Senate, and by a vote of 35 to 5 in the House. 1992 Senate Journal 2143; 1992 House Journal 3169-70.

> be achieved only by the blanket primary which allows complete voter freedom in alternating votes between parties, since an open primary, on the other hand, restricts a voter to candidates of only one party.

Id.

The goal of greater voter participation is one shared by blanket and open primaries. *See LaFollette,* 450 U.S. at 120-24.

The objective of ensuring that officers elected are representative of a broad cross-section of the electorate, rather than accountable to the narrower interests which may control a party organization, is in essence the reason for the shift, begun at the turn of the century and now generally prevalent, from nomination by party convention to nomination by direct primary. *See Lightfoot,* 964 F.2d at 872; Note, *Setting Voter Qualifications For State Primary Elections,* 55 U. Cin. L. Rev. 799-800 (1986-87). In Alaska, where a majority of voters are not affiliated with any party, a closed or partially-closed primary system can plausibly be viewed as bestowing on a minority of the electorate a disproportionately powerful role in the selection of public officeholders. If political parties and politically affiliated voters are to have more power in the election process, that is power taken from unaffiliated voters.

Taken individually and collectively these justifications seem to us to be legitimate and important. Collectively they outweigh the harms to RPA's associational interests claimed in this case.

It is interesting that the "harm" claimed by RPA of loss of responsiveness of elected officials to party principles and party discipline is much the same as the "benefit" claimed by the State of nominating candidates whose appeal is to a broad cross-section of the electorate. This illustrates that this case reflects in part conflicting visions of democracy. On one side are what one commentator calls "party renewal advocates" whose view is that government works best when elected officials are accountable to party principles and party discipline.[19] On the other are those who agree with the turn-of-the-century Progressives who had a "vision of a democracy purged of corruption by placing widely dispersed power in the hands of common men and women."[20]

Obviously, both visions have strengths and weaknesses, and it is not the function of any court to resolve them. The important point for our purpose is that the Alaska Legislature has taken a position. In so doing it has exercised a power which only it can exercise, and its choice is both reasonable and nondiscriminatory.

VI. REMEDY

O'Callaghan seeks a declaration that the 1992 and 1994 primary elections were conducted illegally; prospective relief that requires future primaries to be conducted in accordance with the Alaska Statutes; and a damage remedy under which the State would pay each voter $50

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[19] Lowenstein, *supra*, at 1769-70, 1790-91.

[20] *Id.* at 1791.

for each of the illegal elections in which the voter participated.

O'Callaghan is entitled to a judgment declaring the 1992 and 1994 primaries to have been illegally conducted. The remedy goes no further than this. New elections will not be ordered. The acts of officials who were nominated in those primaries will not be invalidated. O'Callaghan is also entitled to prospective mandatory relief requiring that the 1996 primary be conducted in accordance with the Alaska Statutes.[21] The damage remedy which he requests is not supported by any recognized principle of law and will not be afforded.

VII. CONCLUSION

We hold that Alaska's blanket primary statute is constitutional. A state's election statute does not violate the first amendment associational rights of a political party solely by virtue of the fact that the statute conflicts with

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[21] The remedy in this case is similar to that afforded in *Coghill v. Boucher*, 511 P.2d 1297, 1304 (Alaska 1973). In *Coghill* we concluded that certain ballot counting regulations were invalid. We remanded with directions for entry of a declaration that the regulations were invalid and an order prohibiting the lieutenant governor from conducting future elections under the invalid regulations. We particularly noted: "In fashioning appropriate relief for appellants, however, we are not obliged to invalidate the . . . election in which ballots were tallied in accordance with [the invalid regulations]." *Id.* In the present case the appellant does not expressly seek to set aside an election. We therefore state no view as to whether or under what circumstances such relief might be available.

party rules pertaining to the primary. The blanket primary is nondiscriminatory. While the blanket primary may create some degree of interference with RPA's associational rights, this interference is minor and is justified by the State's interests.

A blanket primary statute may harm the RPA in terms of creating a greater chance of raiding than under a partially-closed primary, though its real effect has not been shown and may not be as extreme as the party argues. Further, there is only a slightly greater loss of accountability of candidates to party principles under the blanket primary as compared to the partially-closed primary. The harm is not great and is justified by the State's interests.

The State's interests in encouraging voter turnout, maximizing voters' choice among candidates, and ensuring that elected officials have relatively broad based constituencies are served by the blanket primary statute. These interests are important and are legitimate objectives for a state to seek to achieve when structuring election procedures.

We reverse the decision of the superior court granting summary judgment upholding the regulations under which the 1992 primary election was conducted. Having previously rejected the arguments that the challenged regulations should be upheld because of the federal court stipulation or because the blanket primary statute is clearly unconstitutional, we conclude that the blanket primary statute is constitutional and thus the regulations under which the 1992 and 1994 elections were conducted

are invalid. A declaratory judgment is entered accordingly. The 1996 primary shall be conducted under the Alaska Statutes. O'Callaghan's damage claim is denied.

REVERSED.

RABINOWITZ, Justice, dissenting.

I dissent from the court's conclusion that the blanket primary statute is constitutional. In my view Alaska's blanket primary statute impermissibly burdens the Republican Party of Alaska's political rights of association in violation of the First and Fourteenth Amendments to the United States Constitution.[1]

Initially I think it appropriate to observe that in accordance with controlling federal precedent this court must apply strict scrutiny in determining the constitutionality of Alaska's blanket primary statute. I rely on *Burdick v. Takushi*, 504 U.S. 428 (1992), *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and *Democratic Party of the United States v. Wisconsin, ex rel. LaFollette*, 450 U.S. 107 (1981), in concluding that the compelling interest standard is controlling in

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[1] Freedom of association has been described by the Supreme Court of the United States as among the preferred rights deemed by implication from the First Amendment's guarantees of speech, press, petition and assembly. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Buckley v. Valeo*, 424 U.S. 1 (1976). *See also* L. Tribe, American Constitutional Law 101 (2d ed. 1988).

resolving issues of federal constitutionality in the factual context of this case.[2]

Burdick contains the most relevant text. There, the Supreme Court wrote:

> [T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. *Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance."* But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.

Burdick, 504 U.S. at 434 (emphasis added) (citation omitted).

The *Burdick* court applied the latter, lower level of scrutiny, and held the Hawaii election laws to be constitutional. *Burdick* explains its application of the less strict test by stating:

> There is no doubt that the Hawaii election laws, like all election regulations, have an impact on the right to vote, but it can hardly be said that the laws at issue here unconstitutionally limit access to the ballot by party or independent

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[2] In reviewing the superior court's interpretation of a constitutional provision, this court applies its independent judgment. *Arco Alaska Inc. v. State*, 824 P.2d 708, 710 (Alaska 1992).

> candidates or *unreasonably interfere with the right of voters to associate and have candidates of their choice placed on the ballot.*

Id. (emphasis added) (citation omitted).

In the case at bar, the blanket primary statute does specifically interfere with the right of the Republican Party of Alaska to have candidates of its choice placed on the primary ballot. That is, the statute prohibits the Republican Party of Alaska from selecting candidates according to its chosen method. The clear implication of *Burdick* is that Alaska's blanket primary statute is subject to strict scrutiny.

Equally clear is Eu. There, the Supreme Court struck down California laws that barred the parties from endorsing candidates in primary elections. Justice Marshall, writing for the court, stated, "If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest and is narrowly tailored to serve that interest." Eu, 489 U.S. at 222 (citation omitted). He continued:

> It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments. Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to " 'identify the people who

> constitute the association,' " and *to select a "standard bearer who best represents the party's ideologies and preferences."*

Eu, 489 U.S. at 224 (emphasis added) (citations omitted).

Thus, according to Eu, the party has the right to select its own nominee, and any attempt to infringe on that right is subject to strict scrutiny.

Tashjian contains similar language. There, Justice Marshall wrote:

> The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote, or, as here, the freedom of political association.

Tashjian, 479 U.S. at 217 (citation omitted). Justice Marshall then applied strict scrutiny to the Connecticut statute, and found it unconstitutional. *LaFollette* also supports this proposition. There the Supreme Court did not specifically state whether strict scrutiny applied. However, it mentions "compelling interest[s]," which implies that strict scrutiny applied to the case. *LaFollette*, 450 U.S. at 124-125.

To understand why Alaska's blanket primary statute has the effect of prohibiting the Alaskan Republican Party from nominating candidates of its choice, it is necessary to review the operation of Alaska's primary election laws. In this regard AS 15.25.010 states:

> Candidates for the elective state executive and state and national legislative offices *shall* be nominated in a primary election by direct vote

> of the people in the manner prescribed by this chapter.

(Emphasis added.) Therefore, parties must participate in the primary election. A "political party" is defined as

> an organized group of voters that represents a political program and that nominated a candidate for governor who received at least three percent of the total votes cast at the preceding general election for governor. . . .

AS 15.60.010(20).

Further, parties have no formal control over who can claim the party mantle in a primary. This is because AS 15.25.030, which governs the declaration of candidates, grants the party no role.[3] Specifically, the only formal affiliation which the statute requires between the party and a candidate seeking office under the name of that party is that the candidate "is registered to vote as a member of the political party whose nomination is being sought." AS 15.25.030(a)(16).

Thus, under Alaska law, a party is compelled to participate in the primary election. Furthermore, a party cannot make its own selection of who will represent it in the primary election.[4] Therefore, the primary is the only

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[3] Parties can nominate the candidate of their choice in exceptional circumstances, such as death of the winner of the primary. AS 15.25.110.

[4] If, for example, only those candidates who received a certain percentage of votes at a party convention or caucus could run in the primary under the party's name, then the party would be assured that the nominees have received at least some affirmative approval from the party. As it stands, the party has no control over which candidates use its name.

mechanism available for the party to choose its nominee. And as a result of the blanket primary statute, the party cannot select who will vote for its nominee.[5]

Taken together, these laws mandate that any organization which wins more than three percent in the prior election for governor loses the right to nominate the candidate of its choice. A law requiring such a result can only be justified when it is narrowly drawn to advance an interest of compelling importance to the state, according to *Tashjian, Eu,* and *Burdick.* Indeed, in *LaFollette,* the Supreme Court approvingly cited Professor Tribe for the following proposition:

> Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the

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[5] The same rules do not apply to non-party "political groups" which run candidates in the primary. AS 15.60.010(19) defines a "political group" as "a group of organized voters which represents a political program and which does not qualify as a political party." Political groups are free to choose their candidates in any way they see fit. If the group then obtains the proper number of signatures on a petition, AS 15.25.140, .160-.170, the candidate is placed on the primary election ballot. AS 15.25.190. Therefore, a political group can nominate its own candidate, since it is not bound by AS 15.25.030(a). Since the group will presumably run a petition drive for only one candidate per office, that candidate will be that group's nominee in the general election. Thus, by having the right to choose who will bear its name in the *primary election,* a group can place a candidate in the general election without having to tally the opinions of unwanted voters.

I do not address whether a political party is allowed to dissolve itself and reconstitute itself as a political group in order to choose nominees of its own choice.

> interests and persuasions that underlie the association's being.

LaFollette, 450 U.S. at 122 n.22.

Thus, it is within the province of a party to decide who will nominate its candidates. Other language in the *LaFollette* opinion makes this point, as well. In footnote 25 of the *LaFollette* opinion the Court acknowledges that a party's rules may not necessarily induce party loyalty more effectively than the state's proposed rule. However, "the stringency, and wisdom, of membership requirements is for the association and its members to decide – not the courts – so long as those requirements are otherwise constitutionally permissible."

In my view, *Tashjian* and *LaFollette* compel the holding that Alaska's blanket primary statute is unconstitutional. The Supreme Court or the United States held in *LaFollette* that the State of Wisconsin could not control the delegate selection process of a national party for national conventions. More particularly, the Supreme Court held that Wisconsin could not force the party to accept a state mandated process for selecting candidates. I cannot distill from *LaFollette* a distinction between the process for selecting delegates and the process for selecting actual candidates. *LaFollette* states, "It is for the National Party – and not the Wisconsin Legislature or any court – to determine the appropriate standards for participation in the Party's *candidate selection process.*" *LaFollette*, 450 U.S. at 124 n.27 (emphasis added). Delegates select candidates, and therefore interference in the delegate selection

process is interference in the candidate selection process. The Supreme Court recognized this.[6]

In *Tashjian*, the state wanted to keep the candidate selection process closed, while the Party wanted to allow some outsiders to vote. In *LaFollette*, the state wanted to keep the candidate selection process open, while the Party wanted to close the process to outsiders. It is critical to note that, in each case, the Party's desires prevailed over the state's asserted interests in closing or opening the process. I think that these cases cannot be distinguished in any meaningful way from the case at hand, and that they require this court to rule in favor of the Party.

Further, I disagree with the majority's statement that "there is merit to the State's and AVOP's position that the danger of raiding exists under the partially-closed primary and that the danger is increased only by a matter of degree by a blanket primary." Under the scheme favored by the Republican Party of Alaska, there is little risk of raiding. I say this for two reasons.

First, rules of the Republican Party of Alaska's scheme do not permit raiding for the simple reason that they do not permit Democrats to vote. Under the majority's definition, raiding occurs when "voters in sympathy

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[6] It is true that the Supreme Court recognized that the state had certain interests in providing for an open primary, so long as the political party was not forced to abide by the results. *See LaFollette*, 450 U.S. at 126 ("But if Wisconsin does open its primary, it cannot require that the Wisconsin delegates to the National Party Convention vote there in accordance with the primary results, if to do so would violate Party rules.").

with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." This implies a degree of sabotage, where members of one party try to weaken the other party's position by voting for a weak candidate. The independents and unaffiliated voters who would be allowed to vote under the Republican Party of Alaska's rules are, by definition, not members of an opposing party, and there is no reason to think that they are in sympathy with another party. They do not seek to strengthen unaffiliated or independent candidates by sabotaging the Republican Party of Alaska's nominating process.

Second, the majority's definition of raiding necessarily implies that something is happening to the party that it does not want to happen. Thus, anything that the Republican Party of Alaska wants to happen in its nominating process cannot be characterized as raiding. By virtue of the fact that the Republican Party of Alaska has invited independents and non-affiliated voters to participate in its primary election, actions taken by those voters cannot be considered "raiding." Indeed, had the Republican Party of Alaska invited Democrats to participate in its primary, actions taken by the Democrats could not be fairly characterized as raiding.

The Professor Tribe quote referred to above illustrates this point. Again, he stated:

> Freedom of association would prove an empty guarantee if associations could not limit control over their decisions *to those who share the interests and persuasions* that underlie the association's being.

(Emphasis added.) Thus, associations are guaranteed the right to control who makes their decisions. If they invite non-members to participate, that is their right. And such participation therefore is not "raiding." It should be noted that the quote does not state only that the association should be able to limit control over their decisions to members, but speaks in more general terms of shared interests and persuasions – the precise group the Republican Party of Alaska hopes to attract and include in the primary.

As the Supreme Court of the United States emphasized in *Tashjian*:

> The nature of the appellees' First Amendment interest is evident. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization.

Tashjian, 479 U.S. at 214 (citations omitted).

In my opinion the State of Alaska has failed to demonstrate compelling state interests which outweigh the harms to the Republican Party of Alaska's constitutionally protected associational rights.[7] The State's objectives of encouraging voter turnout, insuring that elected

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[7] The Republican Party of Alaska need not defend the efficiency or wisdom of its rules, so long as they are otherwise constitutional. *LaFollette*, 450 U.S. at 123 n.25; *cf. Smith v. Allwright*, 321 U.S. 649 (1944) (barring "white primary" as unconstitutional).

officials are representative of the people to be governed, and accommodating the need for a broad cross-section of support from voters, cannot trump the Republican Party of Alaska's constitutionally protected associational interests in determining its own candidates, protecting itself against raiding, and insuring that its candidates are accountable to the Republican Party of Alaska's principles and philosophy.

I therefore conclude that since the State has failed to demonstrate compelling reasons for limiting the associational rights of the Republican Party of Alaska, the blanket primary statute is unconstitutional under the First and Fourteenth Amendments to the United States Constitution.[8]

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[8] Amicus Alaska Federation of Natives points out in its brief that if the current scheme is found unconstitutional, the remedy is not to force the State to run a primary for the Republican Party of Alaska under the Republican Party of Alaska's rules, but instead it is to allow the Republican Party of Alaska to opt out and run its own selection process – caucus, convention, or privately funded statewide primary – so long as the process chosen by the Republican Party of Alaska does not violate constitutional limitations.

IN THE SUPREME COURT OF THE STATE OF ALASKA

MIKE O'CALLAGHAN, Appellant, and JED WHITTAKER, ROBERT GIGLER, and ALASKAN VOTERS FOR AN OPEN PRIMARY, Appellants/Intervenors, vs. STATE OF ALASKA; LIEUTENANT GOVERNOR JACK COGHILL, in his official capacity as Lieutenant Governor, Appellee. and REPUBLICAN PARTY OF ALASKA, Appellee/Intervenor.	Supreme Court No. S-6249 ORDER (Filed Apr. 12, 1996)

Superior Court Nos. 3AN-92-08552/3AN-92-11150 Civil

Before: Compton, Chief Justice, Rabinowitz, Matthews and Eastaugh, Justices. [Fabe, Justice, not participating.]

On consideration of the joint emergency request for rehearing (modification of order), filed on March 29, 1996,

IT IS ORDERED:

1. The request for rehearing is GRANTED.

2. Opinion No. 4330, published on March 20, 1996, is WITHDRAWN.

3. Opinion No. 4338 is issued on this date in its place.

Entered by direction of the Court at Anchorage, Alaska on April 12, 1996.

CLERK OF THE
SUPREME COURT

/s/ Jan Hansen
JAN HANSEN

cc:

Justices
Judge Shortell
Appeals Division
Publishers (OP#4330 3/20/96)
BBS

Michael O'Callaghan
James L. Baldwin
John B. Gaguine
Jed Whittaker
Robert A. Gigler
Stephan H. Williams
Max Gruenberg
Edgar Boyko
Kenneth P. Jacobus

ALASKA STATUTES

A.S. 15.25.010. Provision for primary election. Candidates for the elective state executive and state and national legislative offices shall be nominated in a primary election by direct vote of the people in the manner prescribed by this chapter.

A.S. 15.25.030. Declaration of candidacy. (a) A member of a political party who seeks to become a candidate of the party in the primary election shall execute and file a declaration of candidacy. The declaration shall be executed under oath before an officer authorized to take acknowledgments and shall state in substance:

(1) the full name of the candidate;

(2) the full mailing address of the candidate;

(3) if the candidacy is for the office of state senator or state representative, the election or senate district of which the candidate is a resident;

(4) the office for which the candidate seeks nomination;

(5) the name of the political party of which the person is a candidate for nomination;

(6) the full residence address of the candidate, and the date on which residency at that address began;

(7) the date of the primary election at which the candidate seeks nomination;

(8) the length of residency in the state and in the district of the candidate;

(9) that the candidate will meet the specific citizenship requirements of the office for which the person is a candidate;

(10) that the candidate is a qualified voter as required by law;

(11) that the candidate will meet the specific age requirements of the office for which the person is a candidate;

(12) that the candidate requests that the candidate's name be placed on the primary election ballot;

(13) that the required fee accompanies the declaration;

(14) that the person is not a candidate for any other office to be voted on at the primary or general election and that the person is not a candidate for this office under any other declaration of candidacy or nominating petition;

(15) the manner in which the candidate wishes the candidate's name to appear on the ballot; and

(16) that the candidate is registered to vote as a member of the political party whose nomination is being sought.

(b) A person filing a declaration of candidacy under this section, other than a person subject to AS 24.60 who is filing a declaration for a state legislative office, shall simultaneously file with the director a statement of income sources and business interests that complies with the requirements of AS 39.50. A person who is subject to AS 24.60 and is filing a declaration of candidacy for state legislative office shall simultaneously file with the director a disclosure statement that complies with the requirements of AS 24.60.200.

(c) An incumbent public official, other than a legislator, who has a current statement of income sources and business interests under AS 39.50 on file with the Alaska

Public Offices Commission, or an incumbent legislator who has a current disclosure statement under AS 24.60.200 on file with the Alaska Public Offices Commission, is not required to file a statement of income sources and business interests or a disclosure statement with the declaration of candidacy under (b) of this section.

AMENDMENT TO THE CONSTITUTION.

ARTICLE I.

Freedom of religion, of speech, and of the press. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

RULES OF THE REPUBLICAN PARTY OF ALASKA

ARTICLE XII – GENERAL POLICIES

Section 14. Severability

The various rules of the Republican Party, including those relating to the primary elections, are severable. Any invalidity or unenforceability of any rule or part thereof, shall not affect the remainder of the rule or rules in any way.

ARTICLE XIV PRIMARY ELECTIONS

Section 1. Eligible Voters

Only registered Republicans, registered independents, and those who state no preference of party affiliation shall be allowed to vote in the Republican primary election for Governor, Lieutenant Governor, U.S. Senator, U.S. Representative, and members of the State Legislature.

Section 2. Republican Designation

No person may use the word Republican on any ballot or in any campaign as part of a description of himself as a candidate unless that person is a candidate of the RPA, selected according to the Rules of the RPA.

Section 3. Maximize Voter Participation in Primary Elections

(a) Any voter qualified to vote in the Republican Party primary may vote in that election, regardless of

whether or not that voter has voted in the primary election of any other party.

(b) The fact that a voter has voted in the Republican Party primary election shall not disqualify that voter from voting in the primary election of any other political party or parties, where that voter's participation in the primary election of other parties is authorized or permitted by the rules of the other party or parties, or the statutes of the United States or the State of Alaska.

Section 4. Implementation of Primary Election

The SCC, or the EC in the event that there is insufficient time to convene the SCC, may adopt any and all additional rules, regulations, interpretations, clarifications, and the like, which are necessary or desirable to implement the Republican primary election in accord with other rules adopted at this Special Convention (held March 2, 1991), and pursuant to Article XIV of the Rules of the RPA. Any action taken by the Central or Executive Committee under the provisions of this rule shall have the same force and effect as if adopted by this Convention.

Section 5. Prior Registration Requirement

In order to be a candidate in any Republican Party primary election, a person must have been a registered voter of the Republican Party of Alaska for a continuous period of six (6) months immediately prior to the filing deadline for the primary election. The SCC for statewide candidates and the DC for district candidates may by two-thirds (2/3) vote of each organized committee involved,

waive this rule for specific candidates when they determine such action to be in the best interests of the Republican Party.

Supreme Court, U.S.
FILED
JUL 5 1996
CLERK

No. 95-1962

In The

Supreme Court of the United States

October Term, 1995

REPUBLICAN PARTY OF ALASKA,

Petitioner,

v.

MIKE O'CALLAGHAN, JED WHITTAKER, ROBERT GIGLER, ALASKAN VOTERS FOR AN OPEN PRIMARY, AND STATE OF ALASKA, LIEUTENANT GOVERNOR JACK COGHILL, in his official capacity as Lieutenant Governor,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alaska

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTIONS PRESENTED

(1) Whether the Alaska Supreme Court correctly decided that the State of Alaska's blanket primary imposes a degree of interference with the Republican Party of Alaska's (hereinafter "RPA") First Amendment right of political association that is nondiscriminatory, minor, and justified by the State's interests in encouraging voter participation and choice, and ensuring that elected officials are responsive to their constituencies.

(2) Whether the Alaska Supreme Court correctly decided that the RPA's interests in preventing raiding by other political parties and nominating candidates who are more directly under the control of the party were not substantial enough to counterbalance interests of the state served by a blanket primary system.

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STATEMENT OF FACTS AND PROCEEDINGS

Respondent State of Alaska (hereinafter "the State") adopts and incorporates by reference the statement of facts and proceedings contained in the Order and Memorandum Opinion of the Alaska Supreme Court in *O'Callaghan v. Coghill*, reported at 888 P.2d 1302, 1303 (Alaska 1995), as supplemented by the final opinion in the case, reported at 914 P.2d 1250, 1252-1254 (Alaska 1996).

The State will address certain conclusions offered by the RPA in its statement of facts and proceedings. While it is true that the RPA or other parties were not afforded a trial to develop a factual record, the court took judicial notice of registration statistics and election returns presented in briefs of the parties. *See* 914 P.2d at 1256. The court addressed the necessity of a remand to develop a factual record as follows:

> We do not believe that fact finding is necessary or appropriate in this case. The issues are issues of law; the interests advanced in support of and in opposition to the blanket primary are not especially amenable to courtroom proof and such proof is not, in any case, required.

Id. at 1261 n.16.

The RPA makes a point of the State's change in position concerning the validity of the blanket primary. The RPA contends that "The First Amendment right of the RPA to free political association fell victim to the politics of the moment." RPA Pet. at 6 n.5. Governor Knowles, a Democrat, succeeded Walter J. Hickel, Alaska Independence Party, as governor barely two months

before the Alaska Supreme Court called for supplemental briefing on the validity of the blanket primary.

In the opinion ordering supplemental briefing, the court observed:

> [T]he State's contention that the blanket primary statute is clearly unconstitutional under *Tashjian*, 479 U.S. 208, 107 S.Ct. 544, is incorrect.

888 P.2d at 1304-05. Based on the erroneous assumption of clear invalidity, representatives of the Hickel administration entered into a stipulation with the RPA which ultimately led to the dismissal of *Zawacki v. Alaska*, Case No. A92-414 CIV (D. Alaska 1992) (reproduced at 888 P.2d at 1303) [hereinafter "the *Zawacki* stipulation"]. The State and the RPA agreed that the director of elections would adopt regulations imposing a partially closed primary favored by the RPA for the 1992 and 1994 primary elections. This mistake of law was material to the State's decision to agree to implement a partially closed primary.

Even though the question of the blanket primary has been a partisan issue in Alaska, there is widespread support for it among members of all political parties and unaffiliated voters. *See* 914 P.2d at 1255-56. The State determined to accept the responsibility of defending the validity of an enactment of the state legislature. It was a combination of the Alaska Supreme Court's insistence on a proper determination of the validity of a statute and a

change in administrations that lead to the state's realignment in the case, rather than "politics of the moment."[1]

Finally, the RPA alleges in its statement of fact and proceedings that the majority opinion "placed the burden of proof on the RPA to show a substantial burden to its associational rights." Pet. 7. (citation omitted). The Alaska Supreme Court applied the standard of review mandated in *Burdick v. Takushi*, 504 U.S. 428, 432-34 (1992). *See* 914 P.2d at 1253-54. In applying this standard the court weighed the interests propounded by the parties. The court found the interests of the RPA to be minor compared to the interests advanced by the state.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE ALASKA SUPREME COURT DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

At the heart of this case is a claim by the RPA that it is being compelled by state law to associate with certain persons that do not share common political philosophies. The forced association allegedly occurs when the party nominates candidates for national and state offices. Under the prior decisions of this Court, the State must

[1] The assertion of partisan political motivation made by the RPA has not been limited to the State in this case. The record will show that the RPA moved to disqualify all justices of the Alaska Supreme Court, contending that the members of the court were acting according to a partisan political agenda. The court denied the motion.

demonstrate a substantial interest in its regulation of the activities of political parties. However, the demonstration required is less than that required for the regulation of other groups whose rights of association are not so imbued with governmental action. This deference rests on two established legal premises. First, states enjoy broad power to regulate political parties within their jurisdiction. *See American Party of Texas v. White*, 415 U.S. 767, 781 (1974) ("It is too plain for argument . . . that the State . . . may insist that intra-party competition be settled before the general election by primary election or by party convention."). Second, "[n]either the right to associate nor the right to participate in political activities is absolute." *Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 567 (1973).

Perhaps out of respect for the foregoing legal premises, no federal court has directly ruled on the validity of an open primary. A national political party attempted to test the validity of the Wisconsin open primary in *Democratic Party v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981). The decision in that case was limited because the Court avoided deciding whether the State of Wisconsin may hold an open primary in favor of deciding whether the results of the primary could be binding on the national party. *See id.* at 120-21. In a similar vein, the United States District Court for Minnesota refused to enjoin Minnesota's open primary. *See Anderson v. Growe*, 546 F. Supp. 482, 486 (D. Minn. 1982).

Decisions of the Court have focused on the validity of state statutes that prevent voters from one political party from voting for candidates of another political

party. These statutes have been upheld if the restriction is fair and reasonable.[2] A prior case of the Court suggests that a voter does not have a federal constitutional right to vote in a party primary when she or he is not a party member, where a statute precludes the voter from doing so.[3] However, these decisions are not concerned with the situation presented here. In Alaska, the state legislature has considered the history and particular needs of eligible voters and has decided to implement a process for the nomination of candidates "by direct vote of the people." Alaska Stat. § 15.25.010 (1988). Names of candidates are placed on the primary election ballot in groups seeking a particular office "without regard to party affiliation." *Id.* § 15.25.060 (Supp. 1995).

In the decision below, the Alaska Supreme Court applied the appropriate standard for resolving First Amendment claims developed in prior decisions of this Court.[4] The RPA argues that the manner in which the

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[2] *See, e.g. Kusper v. Pontikes*, 414 U.S. 51, 56-61 (1973) (striking down statute that prevented person from voting in primary if person had voted in another party's primary in past 23 months); *Rosario v. Rockefeller*, 410 U.S. 752, 760-62 (1973) (upholding statute requiring voters to register affiliation with party 30 days before general election in order to vote in next party primary).

[3] *See Nader v. Schaffer*, 429 U.S. 989 (1976) (mem.), *aff'g* 417 F. Supp. 837 (D. Conn. 1976).

[4] This Court explained the standard of review as follows

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward

standard was applied conflicts with prior decisions of this Court. The true nature of these claims was captured when the Court observed:

> Constitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983), *quoted in Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 213 (1986). The Alaska Supreme Court weighed the interests of the parties without benefit of a standard test for resolving the alleged violation of the rights of association of the RPA. The Alaska Supreme Court carefully articulated the interests of the State and the RPA and consistently applied the prior decisions of this Court in reaching its decision.

The RPA prefers a primary where voters registered as Republicans, voters claiming no party affiliation, and voters registered as nonpartisans would be permitted to nominate Republican candidates. A voter with a registration showing an affiliation with another recognized political party could not participate in the Republican primary. An affiliated voter choosing to participate in the Republican primary could change his or her registration

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> by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick, 504 U.S. at 434, *quoted in O'Callaghan*, 914 P.2d at 1254.

up to and including the day of election but could only participate in that primary.[5]

The RPA's preference is motivated by two interests. First, the party wants to prevent raiding by voters who are affiliated with other political parties. According to the RPA, raiders participate in another party's primary for the sole purpose of nominating a weak candidate to enhance the chances of election to office of a candidate of the raider's party.[6] Second, the party argues that its form of primary will produce elected representatives who are accountable to the principles and platform of the RPA. The Alaska Supreme Court, after examining the competing interests of the parties, found that the interests advanced by the RPA were minor when compared to the state's interests of promoting voter participation and ballot secrecy, and forestalling government by political machine.

The court found merit in the State's argument that raiding could not be a major concern if the party was willing to admit approximately 184,000 unaffiliated

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[5] The Alaska Supreme Court characterized this form of primary as "partially closed" because

> the primary is not a classic closed primary in that unaffiliated voters are allowed to participate, yet it does not meet the definition of an open primary, since it is not open to all registered voters.

914 P.2d at 1255.

[6] The record and petition contains only anecdotal evidence of raiding presented in the briefs of the RPA. Nonetheless, the Alaska Supreme Court acknowledged that this interest in preventing raiding was a legitimate concern, "even though its effects may be exaggerated." 914 P.2d at 1261.

voters to participate along with the 78,212 Republicans to nominate party candidates. *See* 914 P.2d at 1256, 1261.[7] Independent voters could participate in the Republican primary for the same reasons as a raider from another party. A statute requiring participation in a blanket primary along with voters affiliated with other political parties imposes a limited burden on the political association considered desirable by the RPA.[8]

The RPA's desire to make candidates accountable to it is in direct conflict with the state interest underlying the blanket primary, which is to make the candidates directly accountable to the voters. However, the party is not without a remedy. These conflicting state and party interests can be resolved by the state legislature.[9] If the party wants to change the law, it need not solely rely on the courts to accomplish its goal.

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[7] These figures refer to the registrations applicable to the 1994 primary and were used in the final opinion issued by the Alaska Supreme Court. *See* 914 P.2d at 1256. The RPA refers to more recent statistics in its petition. The State believes the number of registrations by party used by the RPA in the petition are accurate.

[8] The majority in *Tashjian* rejected Connecticut's argument that a Republican Party primary election closed to voters affiliated with other political parties was justified in the interest of preventing raiding by non-Republican voters. Under the Connecticut statute, as in Alaska, a voter was allowed to register as a Republican up to primary election day. Given those registration opportunities, the Court reasoned that the need to prevent raiding was simply "not implicated." *Tashjian*, 479 U.S. at 219.

[9] While this dispute was pending below, both Houses of the Alaska State Legislature were organized by legislators affiliated with the RPA.

Based on the foregoing analysis of the prior decisions of this Court, the decision below does not present a conflict that would warrant granting the Writ.

II. THE DECISION OF THE SUPREME COURT OF ALASKA DOES NOT CONFLICT WITH THE PRIOR DECISIONS OF THE UNITED STATES DISTRICT COURT OF ALASKA.

The RPA contends that the decision of the Alaska Supreme Court in this case conflicts with a decision of the United States District Court for the District of Alaska. Of the two cases which considered the validity of the RPA partially closed primary, both were dismissed in the preliminary injunction stage, prior to development of an evidentiary record, and without a decision on the merits.

In 1990, the RPA sought to compel the State to implement a partially closed primary. *Doyle v. Alaska*, No. A90-248 CIV (D. Alaska 1990). The Republican Party sought a preliminary injunction to prevent the State from enforcing Alaska Stat. § 15.25.060 (1988), the statute requiring a blanket primary ballot, and to compel the State instead to conduct the primary in accordance with the RPA rule. U.S. District Judge Holland concluded from a review of the case law that he was foreclosed from ruling on whether the party's rule was constitutionally protected because the rule had not yet been precleared by the Department of Justice under Section 5 of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973c (Law Co-op. 1994 Supp. 1996), and was not yet in effect. *Doyle*, (Order, July 16, 1990) (attached to this brief as appendix I).

In 1992, the RPA again filed suit in the United States District Court for the District of Alaska, seeking declaratory judgment and injunctive relief compelling the State to conduct the August, 1992 primary election as a partially closed primary. *Zawacki v. Alaska*, Case No. A92-414 CIV (D. Alaska 1992). However, before the court could announce a decision on the merits, the parties stipulated to implement a partially closed primary by the adoption of administrative regulations. The court approved the stipulation and subsequently dismissed the case without prejudice. It was the *Zawacki* stipulation that the Alaska Supreme Court determined was not sufficient authority to support a finding of invalidity of the blanket primary statute or to authorize the adoption of regulations that conflict with a statute.

The Writ should not be granted because there is not a conflict between decisions of the Supreme Court of Alaska and the United States District Court for Alaska.

III. THE WRIT SHOULD NOT BE GRANTED BECAUSE THE RECORD IS INSUFFICIENT TO PERMIT DECISION OF THE RPA'S CONSTITUTIONAL CLAIMS.

The basic question of the validity of the underlying blanket primary statute was not addressed until the case was on appeal. In the Superior Court of the State of Alaska, the State defended administrative regulations adopted to implement a separate Republican primary. These regulations were adopted under the assumption that the blanket primary statute was clearly invalid to the extent that it allowed voters affiliated with other political

parties to vote for Republican candidates. For this reason, the State did not make a record below in support of the interests it might have in preserving the blanket primary. The defender of the blanket primary was Michael O'Callaghan, a *pro se* litigant.

Mr. O'Callaghan is not an attorney and, the limited record that exists in this case, will show that he demonstrated a lack of knowledge of court procedure in initiating the case, seeking a default judgment, and later seeking, a summary judgment. O'Callaghan did not pursue discovery and did not present to the Superior Court any evidence concerning the State's legitimate interests in conducting blanket primaries that would be relevant to the balancing of interests required under prior decisions of the Court.

The Alaska Supreme Court ruled that the *Zawacki* stipulation was invalid to the extent that it purported to resolve the issue whether the Alaska statute requiring a blanket primary was unconstitutional. 888 P.2d at 1304. The court also explained that "the State's contention that the blanket primary statute is clearly unconstitutional under *Tashjian* . . . is incorrect." *Id.* at 1305. The court found significant differences in that Connecticut case – particularly the fact that the Connecticut statute invalidated in *Tashjian* prevented the RPA from opening its statutory separate primary to independent voters, while the Alaska statute requires a single blanket primary open to all voters. Given the importance of the issue, which the court said was not "adequately briefed by the parties," the court ordered supplemental briefing and invited other interested parties to participate in that briefing as intervenors or *amici curiae*. *Id.* at 1305-6.

After the order for supplemental briefing, the RPA and a group of voters calling itself Alaskan Voters for An Open Primary (AVOP) were allowed to intervene as parties. The Alaska Federation of Natives and the Alaska Independence Party were permitted to participate as *amici*. The RPA ultimately argued in its brief that it should be allowed to develop a factual record to propound and defend its interests in having a separate and partially closed primary. The State argued that the blanket primary is valid as a matter of law; the State offered an alternate argument that a decision of the case would benefit from a remand to develop a factual record of its interests in perpetuating the blanket primary.

It is uncontroverted that there is nothing in the record other than the briefs of the parties to support their claims. The case was far advanced when the real parties in interest joined issue on the questions presented for review. If the Writ is granted, the Court must determine whether the Alaska Supreme Court properly balanced the interests of the parties. Without a "litmus paper test" it will be difficult to resolve the constitutional claims without a detailed record to assist in the effort.

The State does not intend by this argument to detract from the legal reasoning used by the Alaska Supreme Court, for it is correct on the law. Rather, "patience in the judicial resolution of conflicts may sometimes produce the most desirable results." Stevens, *Some Thoughts on Judicial Restraint*, 66 *Judicature* 177, 183 (1982). The RPA predicts litigation from other states that either have open or blanket primaries on the same questions presented in this case. RPA Pet. at 19-22. Solutions to the questions presented could be further developed by the supreme

courts of other states before they are resolved by this court.[10]

IV. THE COURT SHOULD DENY THE WRIT BECAUSE THE RPA INTENDS TO PRIVATELY NOMINATE CANDIDATES AND FURTHER MULTIPLY THE LITIGATION PERTAINING TO THIS MATTER.

The RPA informed the Court that it has started the process of implementing a private, partially closed primary using mail-in ballots. RPA Pet. at 23. It claims this mail-in primary will take place

> only if this court does not reverse or stay the decision of the Supreme Court of Alaska, such that the 1996 Republican primary election can be conducted according to RPA rules.

Id. This presumably means that the RPA will undertake conduct that may make the instant controversy moot, or raise a question whether it is ripe for review at this time. The new legal issue would involve the extent to which the party can nominate candidates by a partially closed primary process free from state regulation.

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[10] *See, McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied where issue requires "further study" in lower courts "before it is addressed by this Court"); *Gilliard v. Mississippi*, 464 U.S. 867 (1983) (Marshall, J., dissent from denial of certiorari addressed to "those of my Colleagues who agree with me [on the merits] but believe that this court should postpone consideration of the issue until more state supreme courts and federal circuits have experimented with substantive and procedural solutions to the problem").

The RPA appears to be pursuing the opt-out strategy described in the dissenting opinion below. *See* 914 P.2d at 1268 n.8 (Rabinowitz, J., dissenting). Justice Rabinowitz acknowledged a point made by *amicus* Alaska Federation of Natives that the RPA's remedy is not to force the State to operate a primary to its liking but to withdraw from the state nominating process. The party would then privately nominate candidates. Contrary to the remedy mentioned by Justice Rabinowitz, the RPA intends to pursue this strategy even before there is a determination of the validity of the State's blanket primary statute.

The RPA intends to seek a declaration from the United States District Court for Alaska whether a private, partially closed primary may be validly conducted to nominate Republican candidates for the 1996 general election. By following this course of action, the dispute changes from whether the blanket primary is valid to whether the party may operate independently notwithstanding a statute that requires recognized political parties to participate in a blanket primary. The RPA is abandoning the original dispute with the State in favor of establishing a separate nominating process free from legislative interference.

Pursuit of the opt-out strategy makes a decision in this case more in the nature of an advisory opinion. The RPA is embarking on yet another dispute with the State that must progress through the lower courts and may ultimately be resolved by means other than an appeal to this Court. For this additional reason, the Court should not grant the Writ.

CONCLUSION

For the reasons stated in this brief, the Court should deny the petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX I

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALLEN GRANT DOYLE, JR., and the REPUBLICAN PART OF ALASKA, Plaintiffs, vs. STATE OF ALASKA, et al., Defendants.	No. A90-248 Civil (Filed July 10, 1992) ORDER (Preliminary Injunction Denied.)

The court has under consideration a motion for preliminary injunction, filed June 11, 1990, by plaintiffs Allen Grant Doyle, Jr., and the Republican Party of Alaska.[1] Doyle is state chairman of the Republican Party of Alaska ("Party"). The motion seeks an order restraining and enjoining the several defendants from conducting the Party's August 28, 1990, primary in any manner other than as provided by Article XIV of the Party's rules, which was adopted in March of 1990 at the party's statewide convention. As part of the desired injunctive relief, plaintiffs additionally request the court to restrain and enjoin defendants from enforcing, in the Party's August

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[1] This action was originally filed in Fairbanks on June 11, 1990, and assigned to District Judge Kleinfeld. Judge Kleinfeld subsequently recused himself, and the case was transferred to Anchorage on June 22, 1990.

primary, two state statutes: As 15.25.060 (requiring a single primary election ballot containing the names of all candidates for each office, grouped by office, without regard to party affiliation) and AS 15.07.070(c) and (d) (which defendants interpret to require that voters designate their party affiliation, or non-affiliation, at least thirty days prior to the primary).

Defendants include the State of Alaska; the State's Division of Elections ("DOE"); David Koivuniemi, the director of the DOE; and Lieutenant Governor Stephen McAlpine, in his official capacity as supervisor of elections. Defendants oppose plaintiffs' motion. A joint *amicus curiae* brief has been filed by the Alaska Federation of Natives and the Alaska Democratic Party. The *amici* also oppose plaintiffs' motion for provisional relief.

Additionally, plaintiffs filed a motion on July 6, 1990, requesting the court to enter an order directing the State of Alaska to make certain submissions to the Voting Section, Civil Rights Division of the Department of Justice, Washington, D.C., (hereinafter referred to as "Voting Section"), pursuant to section 5 of the Voting Rights Act of 1965. On July 9, 1990, defendants filed an opposition to plaintiffs' motion for an order directing submission.

A telephonic status conference was held on July 9, 1990. Counsel for plaintiffs, defendants, and *amici* participated, as well as an attorney from the Voting Section. The court heard oral argument on Thursday, July 12, 1990. For the reasons outlined hereinbelow, plaintiffs' motion for preliminary injunction and motion for an order directing the state to submit matters to the Department of Justice are denied.

Jurisdiction

The motion for preliminary injunction raises federal constitutional issues, as well as certain matters cognizable under the Voting Rights Act of 1965 (as amended), 42 U.S.C. §§ 1971-1974 (1981). Additionally, plaintiffs have moved for an order requiring defendants to submit matters to the Voting Section in accordance with regulations promulgated by the Department of Justice pursuant to the Voting Rights Act. Jurisdiction is, as a general proposition, appropriate under 28 U.S.C. § 1331.

Background

Since 1967, statewide primaries in Alaska have been conducted as "blanket, open" primaries, with respect to the nomination of candidates for elective statewide and federal political offices. AS 15.25.010, *et. seq.* Primary candidates are listed on a single ballot, grouped together by office sought rather than party affiliation. AS 15.25.060. Primary voters are not restricted to voting for candidates who correspond with the individual voter's political party affiliation (or lack thereof). By statute, voters are not eligible to vote in a primary unless they have registered to vote at least thirty days in advance of the scheduled date for a primary. AS 15.07.070. A voter wishing to change his or her existing registration must also do so at least thirty days in advance. AS 15.07.060 lists the information required for registration, but does not include a requirement that a registrant's party affiliation be declared. However, by administrative interpretation, the State has determined that a registrant must

declare party affiliation (or lack thereof) thirty days in advance of an election as part of the registration process.

The Party held its statewide convention in March of 1990. Shortly before the convention began, a delegate to the convention informed Linda Edgeworth, a key staff member at the DOE, that the Party was likely to adopt a rule change regarding the 1990 primary. On March 31, 1990, the convention adopted a party rule directly affecting the manner in which the Party's primary, which is scheduled to be held on August 28, 1990, would be conducted. The newly adopted rule, Article XIV, provides as follows:[2]

> Only registered Republicans, registered independents, and those who state no preference of party affiliation shall be allowed to vote in the Republican primary election for Governor, Lieutenant Governor, U.S. Senator, U.S. Representative, and members of the State Legislature.

The party clearly desired that its new rule be implemented by defendants in time for the August 1990 primary. A copy of the rule was hand-carried to Linda Edgeworth's office on April 2, 1990. Lieutenant Governor McAlpine's office was notified telephonically on April 9, 11, 12, and 16 regarding the newly adopted rule. On April 20, 1990, the Party wrote a letter to McAlpine's office. The full text of the new rule was set forth in the letter, and the

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[2] Although the rule is silent on the subject, the Party intended that any voter might change his designated party affiliation at the polls on the day of the primary election *and* thereby qualify to vote in the Republican primary.

Party requested McAlpine to revise the voting procedures for the August 1990 primary to properly implement the new rule change. The Lieutenant Governor's office received the letter on April 27. Defendant Koivuniemi received a telefaxed copy of the same letter on April 25, 1990, and James Baldwin of the state Attorney General's Office also received a copy in late April. By letter dated May 5, 1990, Ken Jacobus advised Stephen McAlpine of certain case law authority upon which the Party relied in adopting the new rule. A copy of Jacobus' May 5 letter was also sent to defendant Koivuniemi.

After this initial flurry of activity, the Party waited for the outcome of the Alaska Democratic Party convention, held in Nome in mid-May. The Party apparently expected that the Democrats would adopt a similar rule change, but they did not.

After the Democratic convention, the Party began a series of earnest contracts with defendants to ensure that defendants would and could implement the rule change in time for the August primary. These contracts have been extensively briefed by the parties and the court only summarizes them herein.

On May 24, 1990, a telephone conference was held by defendant Koivuniemi. Participants included Ken and Cheri Jacobus, counsel for the State, and key State election officials. Among other things, Koivuniemi expressed concern regarding the State's ability to properly implement the new rule, given the short time remaining before the primary. He opined that the rule was ambiguously

worded and requested clarification on the Party's proposal that voters be permitted to change their party registration as late as the day of polling. There was also discussion regarding the manner in which absentee ballots would have to be handled if the rule were implemented for the August 1990 primary. On May 28, 1990, Kenneth Jacobus, Party counsel, sent a follow-up letter to Koivuniemi addressing the aforementioned concerns.

A second telephone conference was held by Koivuniemi on June 5, 1990, with essentially the same participants as before. Again, the discussion centered on several specific logistical problems (preparation of primary ballots, mailing of absentee ballots, and so forth) that the State felt must be resolved in order to properly implement the new rule.[3] During this telephone conference, the Party learned that it needed to "preclear" its rule change with the Voting Section. Nothing was resolved in the second telephone conference. The State firmly maintained that it would apply the thirty-day registration requirement with respect to changes of party affiliation in conjunction with implementing the new rule, and generally reiterated its belief that insufficient time remained for implementation. The Party then made a submission to the Voting Section, to which the State formally objected by its letter to the Department of Justice dated June 15, 1990, and in a follow-up letter dated

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[3] The extensive regulatory changes that the State believes necessary to implement the rule change for the August primary are thoroughly documented in the two affidavits of Linda Edgeworth filed in this action.

June 25, 1990. The instant action was filed on June 11, 1990.

Applicability of the Voting Rights Act

The primary purpose of the Voting Rights Act ("Act") is to extend the protection of the fifteenth amendment to members of racial and language minorities, to prevent discrimination in the form of denial or abridgement of the right to vote. *State of South Carolina v. Katzenbach*, 383 U.S. 301, (1966). Of particular concern are voting qualifications, prerequisites, standards, practices, or procedures which might have a racially discriminatory effect. Section 5 of the Act requires that any jurisdiction "covered" by the Act may not enforce any change pertaining to the manner in which elections are conducted without obtaining a declaratory judgment from the District Court for the District of Columbia that the proposed change is not discriminatory within the meaning of the Act. 42 U.S.C. § 1973c. Alternatively, a covered jurisdiction may satisfy the requirements of Section 5 by submitting the proposed change, along with certain supporting documents, to the Attorney General of the United States for "preclearance". *See generally*, 28 C.F.R. § 51 (1990); *see also, Allen v. State Board of Elections*, 393 U.S. 544, 549-50 (1969). The United States Supreme Court has consistently construed Section 5 to have the broadest possible scope. *Perkins v. Matthews*, 400 U.S. 379, 387 (1971). This has resulted in jurisdictions routinely submitting a plethora of proposed election changes to the Attorney General, some of which are very minor in nature. *See*, 28 C.F.R. § 51.12. While most of the submissions are provided by states, political parties are subject to Section 5 of the Act

and its preclearance requirements. 28 C.F.R. § 51.7 provides in part:

> Certain activities of political parties are subject to the preclearance requirement of Section 5. A change affecting voting effected by a political party is subject to the preclearance requirement: (a) If the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of section 5. . . . . Changes with respect to the conduct of primary elections at which party nominees . . . are chosen are subject to the preclearance requirement of section 5 . . . .

Submissions are made to the Voting Section. Under pertinent regulatory guidelines, the Attorney General has sixty days in which to review a submitted election change. 28 C.F.R. § 51.9. However, if a submitting jurisdiction materially supplements its original submission, then a new sixty-day period of consideration may go into effect. 28 C.F.R. § 51.30. If the Voting Section objects to the proposed change, the submitting party may request reconsideration. This, too, results in a new sixty-day period for review by the Voting Section. 28 C.F.R. § 51.45.

In this case, it is agreed that Alaska is a "covered" jurisdiction (see, 28 C.F.R. § 55 Appendix) and that the Party's new rule is subject to the preclearance requirement of Section 5 of the Act. Pursuant to 28 C.F.R. § 51.7, the Party made its submission on June 7, 1990 and requested expedited consideration. The party subsequently learned that defendants would also have to submit any new regulations and guidelines developed to

implement the Party rule. *See*, 28 C.F.R. § 51.22. After contacting counsel for the Voting Section, the Party learned that the Voting Section would concurrently consider defendants' proposed implementation guidelines, notwithstanding that defendants are not required to submit such guidelines until the Party's rule had already been precleared. Counsel for the Voting Section *suggested* to defendants that they prepare a submission for concurrent consideration. Plaintiffs filed a motion on July 6, 1990, requesting the court to order defendants to make their submission immediately. In the telephonic status conference held July 9, 1990, defendants averred that they have been working diligently to prepare the submission, and that it should be sent to the Voting Section, by express mail, on July 13, 1990. This was confirmed at oral argument on July 12, 1990.

In the July 9 status conference, counsel for the Voting Section indicated that the Voting Section had received several supplementations from the Party, the latest having been received that day. The court was also advised that the Voting Section would likely consider the latest supplementation to be a "material" one, such that a new sixty-day review period had begun to run; that the Voting Section viewed the Party rule as presenting a fairly substantive change which would require thorough review; and that it intended to obtain additional input from interested parties, particularly the Native voters in Alaska.

Thus, plaintiffs seek provisional relief from this court *prior* to any preclearance decision by the Voting Section. The parties are in agreement that the rule change cannot be validly employed in an election without preclearance from the Voting Section. The court's research shows this

to be correct. *See, e.g.*, 28 C.F.R. § 51.1, 51.10. The Supreme Court has consistently so held. *See, Connor v. Waller*, 421 U.S. 656 (1975) (per curiam) (changes not precleared pursuant to Section 5 are "not effective as law"); *Georgia v. United States*, 411 U.S. 526, 538 (1973) (election laws are "frozen" until declaratory judgment or preclearance is obtained); *City of Rome v. United States*, 446 U.S. 156, 160-61, *reh'g denied*, 447 U.S. 916 (1980) (preclearance required); *McDaniel v. Sanchez*, 452 U.S. 130, 137 (1981) (laws not effective without preclearance).

The Party would have the court enter a prospective order enforcing the new rule for a Republican primary conditioned upon Voting Section clearance of the rule. To grant such an order, the court must necessarily evaluate the Party's alleged constitutional rights which, if established, would support implementation of the rule. In voting rights cases, it has been held that it is error for a court to adjudicate such constitutional claims until the Voting Section acts on the proposed change in voting rules.[4] This court concludes that it is presently foreclosed

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[4] *See, e.g., McDaniel v. Sanchez*, 452 U.S. 130, 146 (1981) (quoting *Wise v. Lipscomb*, 437 U.S. 535, 542 (1978)); *United States v. Board of Supervisors*, 429 U.S. 642, 646-47 (1977); and *Connor v. Waller*, 421 U.S. 656 (1975) (per curiam). *Cf. Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex. 1982), wherein plaintiffs raised constitutional challenges both to the existing Texas voter apportionment scheme and to a new apportionment plan adopted by the state. The three-judge court struck down the existing scheme, but held that it could not adjudicate the constitutionality of the new plan which had failed to obtain Department of Justice preclearance. However, the court retained jurisdiction in order to fashion an emergency apportionment plan for upcoming statewide elections, and the plan was

from ruling upon whether the Party's rule is constitutionally protected until the rule becomes operative and effective by virtue of Voting Section review and approval. To act sooner would amount to the court rendering an advisory decision in violation of article III, section 2, of the United States Constitution.

Preliminary Injunction Analysis

The foregoing discussion disposes of plaintiffs' motion for preliminary injunction and, indeed, suggests that plaintiffs; complaint is subject to dismissal on the theory that there is not presently any justiciable case or controversy. For the sake of completeness, and in order that the court's entire analysis of plaintiffs' motion may be available for possible appellate review, the following additional discussion of the matters before the court are included.

In a straightforward fashion, plaintiffs seek to have the court order the defendants to place the new Republican primary rule into effect. They claim that their decision to alter the primary is fully supported by constitutional case law construing the first amendment rights of association enjoyed by state political parties. Plaintiffs principally rely on the holdings in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); and *San Francisco County Democratic Central Committee v. Eu*,

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ordered without preclearance. *Id.* at 525-526 n.14 (citing *Conner v. Waller*, 421 U.S. at 656-57 (inability to adjudicate constitutional claims regarding new plans does not divest district court of jurisdiction to order a temporary plan)).

792 F.2d 802 (9th Cir. 1986), *vacated & remanded*, 479 U.S. 1024, *on remand*, 826 F.2d 814 (9th Cir. 1987), *affirmed*, 489 U.S. 214 (1989). Plaintiffs see two primary benefits resulting from the new rule: a decreased opportunity for crossover voting ("raiding"), and a chance to strengthen the Party by nominating and electing Republican candidates who are more consistent in their party's ideology.

Defendants acknowledge the rights of association at issue here, but contend that the State of Alaska has certain compelling governmental interests which must be balanced against plaintiffs' alleged right to alter the primary. Specifically, defendants aver that the State has a duty to ensure the integrity and orderliness of elections, and that insufficient time remains before the August primary in which to properly implement the Party rule and still fulfill that duty. Within that duty, defendants express two major concerns: that the State must shoulder an unacceptable administrative burden to make all the necessary changes to implement the Republican primary, and that many voters (particularly rural voters, many of whom are Native and protected under the Voting Rights Act) will be confused and possibly disenfranchised due to the late change in the primary election procedures.

In addition to their Voting Rights Act arguments, *amicus* Alaska Federation of Natives expresses two concerns. First, it argues that implementation cannot be smoothly carried out in the few weeks remaining until the primary election, which will result in confusion and disenfranchisement among Native voters who will not be properly and timely advised of the changes. Secondly, the Federation contends that Native voters have traditionally benefitted from being able to employ crossover voting to

build political coalitions helpful to Native causes. In a related vein, the Alaska Democratic Party asserts that it still welcomes Republican voters crossing over in the primary.

The Ninth Circuit recently articulated and summarized the pertinent factors which a district court must consider in deciding whether to grant or deny injunctive relief. *State of Alaska v. Native Village of Venetie,* 856 F.2d 1384 (9th Cir. 1988). Those four factors are:

> (1) The likelihood of the plaintiff's success on the merits;
>
> (2) the threat of irreparable harm to the plaintiff if the injunction is not imposed;
>
> (3) the relative balance of this harm to the plaintiff and the harm to the defendant if the injunction is imposed; and,
>
> (4) the public interest.

Id. at 1388. The court went on to note that the four factors can really be condensed into two factors: the likelihood of success on the merits and the relative balance of potential hardships to the plaintiff, the defendant, and the public. *Id.* at 1189. Those two primary factors have been employed in a test framed in the alternative, though the alternatives are really to be treated by the district court, for analytical purposes, as "extremes of a single continuum." *Id., quoting Benda v. Grand Lodge of International Association of Machinists & Aerospace Workers,* 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed,* 441 U.S. 937 (1979). The alternative test has been framed thusly:

> Basically, plaintiffs are entitled to preliminary injunctive relief if:

1) They demonstrate
   - a probable success on the merits, and
   - a possibility of irreparable injury;

2) or if they demonstrate
   - a fair chance of success on the merits (*i.e.*, serious questions are raised), and
   - the balance of hardships tips sharply in their favor.

Native Village of Venetie, 856 F.2d at 1389.

Applying the foregoing, the Court will first focus upon the issue of probable success on the merits. As discussed above, the court cannot say that plaintiffs will probably succeed on the merits. At the most, plaintiffs raise a serious question. The court accepts, and the defendants themselves appear to accept, plaintiffs' contention that first amendment rights of free association are substantially implicated in the rule change which the Party would put into effect. The United States Supreme Court has recognized this right in its decision in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). As important as these rights may be, however, there is little chance of plaintiffs prevailing on the merits of the present complaint because, as set out above, the Party seeks to enforce an inchoate rule – that is, a rule raising serious constitutional questions which this court does not presently have the power to reach due to the absence of Voting Rights Act preclearance.

The foregoing appraisal of the Party's chances of success on the merits calls into play that portion of the test for granting or denying preliminary injunctions

which calls upon a plaintiff to demonstrate that the balance of hardships tips sharply in the plaintiff's favor. In this case, the court concludes that the hardships are substantially in equipoise.

The court's refusal to order implementation of the Party's primary election rule will result in the conduct of a "blanket" open primary in which registered members of other political parties can vote in the Republican Party primary. The court's decision forces the Republican Party to associate with those Democrats or Alaska Independence Party members who would cross party lines and vote for a Republican in the upcoming primary election. The harm is of a nature which is substantially irreparable.

On the other side, defendants and *amici* argue persuasively that rural Alaskans will be disenfranchised because of the complexity of regulatory changes which must take place in order to implement the Party's new primary rule. While the State of Alaska is blessed with substantial means of communication between large cities and most of the very small villages in the state, the court is convinced, on the basis of defendants' showing, that there is inadequate time to formulate the rule changes, educate the rural election workers, and still provide time enough for the latter as well as others using public radio, television, and other means of communication to educate the public as to the options available to them in the upcoming primary election under the Party's new rule. Especially troubling to the court is the Party's suggestion that, under its rule, an individual voter might be entitled to vote in both the Republican primary and the "other" primary as well. The possibility of a voter having two votes (one in each primary) strikes the court as dramatic

proof of the complexity (which the court did not initially perceive) of educating the electorate.

Similarly, the defendants' approach to structuring ballots, were the Party's rule to be implemented, suggests further complexities. The defendants suggest that the Republican Party ballot should list all candidates, of whatever party, such that Republicans could vote for whomever they wish; and that the "other" primary should list all candidates except Republican candidates. The court's initial reaction to this proposed implementation of the Party's rule was that it stood the rule on its head. On further reflection, the court is still of a view that the State's suggestion for the ballot structure is disingenuous; but the mere fact that it is a plausible approach to implementation of the rule further underscores the complexity of conducting simultaneously two or more primary elections when the rules for all are not the same and where, as here, a certain amount of crossover voting is still allowed. Thus the court has concluded that there is a substantial risk that the defendants will be unable to adequately instruct the electorate in time for an August 28, 1990, primary election, and that some will be discouraged from voting and others will be at best confused, and at worst misled, despite everyone's best efforts as regards exercising their vote. The court views this type of hardship as irreparable also.

Understandably, neither the Party nor the defendants have attempted, nor is it likely that they would be able to quantify in a meaningful fashion the extent of hardship occasioned by the harm to which the court perceives each side to be exposed. Given the prospective nature of the analysis, it is not possible to say how many votes may be

cast by Democrats in what should be a Republican rule primary, nor is it possible to say how many voters may be disenfranchised because of inadequate opportunity to construct a new primary election procedure and implement it. This much the court can say very readily: The balance of hardships certainly does not tip sharply in the Party's favor. In a very rough sense, the amount of harm to which each is exposed is the same; and, in the absence of any other proof, the court concludes that the harm to the Party and to the voters who may be disenfranchised is roughly equal.

In addition, the public interest has a part in the balance of hardships which is not addressed by the foregoing. *Native Village of Venetie,* 856 F.2d at 1388. In this case, the court perceives there to be a substantial public interest in having elections conducted timely and in an orderly fashion. *Coghill v. Boocher,* 511 P.2d 1297 (Alaska 1973); *Tarrazas v. Clements,* 537 F. Supp. 514, 527 (N.D. Tex. 1982).

The Party, on brief and in oral argument, has made fleeting reference to the possibility of deferring the primary election in order to afford more time for instruction to the voters and more time for the Department of Justice to clear the Party's new primary election rule. The foregoing authorities suggest that such action should not be taken except for very compelling reasons. The court perceives no compelling reason to disrupt the normal election process in this case. It takes no great amount of imagination, nor is it unduly speculative, for the court to suggest that a delay in the primary election risks changing the chemistry of the election itself. It is impossible to say what changes might occur between August 28, 1990,

and some subsequent date to which an election might be postponed. Inevitably, a change in the election date will affect the ability or willingness of some voters to participate in the election. Thus the public interest consideration adds weight on the defendants' side of the balance of hardships, not the plaintiffs.

Finally, and not a part of the general calculus for granting or denying preliminary injunctions, the court has given some small consideration and weight to the defendants' contention that the Party has delayed seeking to affect the rights which it would have the court order. Injunctive relief is equitable in nature, and the court has the discretion to consider whether or not the party seeking injunctive relief has timely moved to protect his or its interests. In this instance, there is an element of delay on the part of the Party. The Party might have sought preclearance from the Voting Section of the Department of Justice immediately upon adopting its rule for a Republican primary election. It did not do so. The Party delayed more than sixty days between the adoption of its rule and the presentation of the matter to the Department of Justice. At the conclusion of oral argument, the court suggested that the Party was accountable for some laches or delay in pursuing its rights. On further reflection, the court has come to doubt that the loss of sixty days' time for consideration of the Party's rule by the Department of Justice has any role in determining, as between the Party and the defendants, whether a preliminary injunction should issue. There was no delay on the part of the Party in its dealings with the defendants, and the Party has already been saddled with the effect of its delay before the Justice Department when the court held that it was

without power to consider the constitutional aspects of the Party's new primary election rule because the Voting Section had not acted.

For the foregoing reasons, the court would deny a preliminary injunction even if it had the power to consider the merits of plaintiffs' complaint.

Plaintiffs have also moved for an order requiring the State of Alaska to immediately make its submission to the Department of Justice, Voting Rights Section. This motion is now in substance moot in light of the fact that the plaintiffs' motion for preliminary injunction has been denied. More generally, the parties now seem in agreement that there is no regulatory requirement that the State file its procedures with the Department of Justice until after the Voting Section has acted upon the Party's presentation. *See* 28 C.F.R. § 51.22.

Accordingly, the plaintiffs' motion with regard to the State filing with the Department of Justice is denied.

Finally, the Party has suggested that the court must rule upon certain state law questions which it fears will be outside the purview of the Justice Department's Voting Section. Here the Party has reference to disagreements with the State as to (among other things) whether a voter's party designation may be changed on the day of election or whether it must be changed thirty days in advance. These matters present state law questions which are not necessarily raised by the motions presently before the court, and the court declines to offer any opinion on these issues at this time.

DATED at Anchorage, Alaska, this 13th day of July, 1990.

/s/ H. Russel Holland
United States
District Judge

cc: W. Ross (ROSS)
K. Jacobus
AAG-K
J. Rubini (BIRCH)

APPENDIX 2

CHARLES E. COLE
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Nancy R. Gordon
Assistant Attorney General
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Anchorage, Alaska 99501

Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

CONSTANCE L. ZAWACKI and the REPUBLICAN PARTY OF ALASKA, INC., Plaintiffs, v. STATE OF ALASKA; STATE OF ALASKA DIVISION OF ELECTIONS; LIEUTENANT GOVERNOR JACK COGHILL, in his official capacity of Supervisor of Elections; and CHARLOT THICKSTUN, in her official capacity of Director of Division of Elections, Defendants.	(Filed Jul. 9, 1992) **STIPULATION AND APPROVAL** Case No. A92-414-CIV

The parties stipulate that in light of the Court's preliminary conclusion that the Lt. Governor has the authority to promulgate regulations implementing the

principles enunciated in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), the Lt. Governor will adopt emergency regulations that:

(1) Provide for two separate ballots for the primary election, as follows:

(a) A Republican only ballot containing names of Republican candidates only and available only to Republican, nonpartisan and undeclared voters, and

(b) a statutory ballot containing candidates of all other parties and available to all voters.

The parties also stipulate that:

(2) A voter may only select and vote one ballot;

(3) That this case is dismissed by joint agreement of the parties.

DATED: July 9, 1992 CHARLES E. COLE
ATTORNEY GENERAL

By: /s/ Nancy R. Gordon
Assistant Attorney
General

DATED: July 9, 1992 /s/ Kenneth P. Jacobus
Kenneth P. Jacobus

ORDER

IT IS SO APPROVED and this case is hereby dismissed without prejudice.

Dated this 10 day of July, 1992 in Anchorage, Alaska.

/s/ James K. Singleton
JAMES K. SINGLETON
U.S. DISTRICT
COURT JUDGE

CC: K. Jacobus
E. Boyko (BOYKO)
D. Clocksin (WAGSTAFF)
K. Morford (JENSEN)
B. Botelho AG-200)
J. Rubini (BIRCH)

95 1962

No. _____

Supreme Court, U.S.
FILED
JUL 5 1996
CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

Republican Party of Alaska,
Petitioner,

vs.

Michael O'Callaghan, Jed Whittaker, Robert Gigler,
Alaskan Voters for an Open Primary, and State of Alaska,
Lieutenant Governor Jack Coghill, in his
official capacity as Lieutenant Governor,
Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court of Alaska

BRIEF IN OPPOSITION

Michael O'Callaghan
1540 Medfra
Anchorage, Alaska 99501
(907) 277-8889
Respondent

July 5, 1996

QUESTIONS PRESENTED

1. The constitutionality of a blanket primary.

2. Timeliness of adjudicating election issues.

3. Factual errors in Alaska Supreme Court Opinion 4338 issued April 12, 1996.

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Alaska Statute Sec. 15.10.105(a). Administration of Elections. The Lieutenant Governor shall appoint a director of elections.

Alaska Statute Sec. 15.15.010. General Administrative Supervision by Director.

Alaska Statute Sec. 15.25.010. Provision for primary election. Candidates for the elective state executive and state and national legislative offices shall be nominated in a primary election by direct vote of the people in the manner prescribed by this chapter.

Alaska Statute Sec. 15.60.010 (3). Definitions. "Director" means the director of elections who is the chief election officer of the state appointed in accordance with AS 15.10.105(a).

HISTORY OF THE CASE

The Appellant, Michael O'Callaghan, went to the polls on September 8, 1992 to vote in the primary of the state of Alaska. He was asked to declare party affiliation prior to receiving a ballot. He received a ballot with only Republican candidates. On September 17, 1992 the Appellant filed a complaint alleging numerous violations of Alaska statute. (Record Page 1-3)

Also on September 17, 1992 he filed a motion for expedited consideration which was denied on October 2, 1992. (Record Page 5)

On September 29, 1992 he filed a motion *Quo Warranto* with the Superior Court which has never been answered. (Record Page 5)

The Appellant also filed another motion for expedited consideration on October 22, 1992 which was denied November 2, 1992. (Record Page 7-8)

O'Callaghan filed case 3AN-92-11150 on November 12, 1992 challenging the legality of the 1992 general election.

The State moved for expedited consideration on December 17, 1992 which the Judge never acted upon.

Case 3AN-92-11150 was consolidated with the case at bar on April 13, 1993.

On May 26, 1993 the Appellant filed a motion to admit evidence based on Judge Shortell's order (Record Page 33-34) rejecting the Appellant's motion for a summary judgment November 6, 1992. (Record 37-42) Judge Shortell never admitted the evidence.

On November 16, 1993 the Appellant asked for a motion to amend based on the allegations that the primary

violated the Federal Voters Rights Act (42 U.S.C. 1973c). (Record Page 230) This motion was denied January 25, 1994.

16 months after O'Callaghan's complaint was filed, Judge Shortell granted the State's motion for summary judgment on January 25, 1994 (Record Page 234) and the Appellant began a merit appeal based on a violation of civil rights to the Supreme Court of the State of Alaska.

STATEMENT OF THE CASE

O'Callaghan appealed the Superior Court decision to the State of Alaska Supreme Court on February 24, 1994.

The court was petitioned for expedited consideration with the appeal. O'Callaghan was denied expedited consideration. The court was also petitioned for expedited consideration on an emergency motion filed June 23, 1994 by intervenor Whittaker. A decision was desired prior to the 1994 Primary. This petition was also denied.

A preliminary decision was received on February 3, 1995 (888 P.2d 1302). This decision was not complete. The court said,

> [W]e found that the briefing was inadequate to determine the constitutionality of the blanket primary and ordered additional briefing. In view of the importance of this case we invited participation by the political parties of Alaska and others.

O'Callaghan objected in his motion for reconsideration which was denied.

A final opinion was produced on March 20, 1996, then withdrawn in favor of a substitute opinion of April 12, 1996.

In its opinion, the Alaska Supreme Court declared the 1992 and 1994 official state primary election ballots illegal. Unprecedented in the history of the United States.

Kenneth Jacobus then began his appeal to the United States Supreme Court.

PRESENTATION OF FEDERAL QUESTION

The federal questions of due process and equal protection, protected by the U.S. Constitution, were raised by Michael O'Callaghan in his original complaint. (R PP 1&3) These issues were raised once again with appeal to the State of Alaska Supreme Court. (R PP 235) (February 24, 1994)

REASONS FOR GRANTING WRIT

O'Callaghan does not oppose the granting of the Writ for it poses a question of inalienable rights as defined by our constitution, courts and legislatures.

O'Callaghan wants to notice the Court of a 1967 Alaskan legislative delineated right:

> The right to vote for candidates of their choice without regard to party affiliation in the primary election. (§ 1 ch 1 SLA 1967) Alaska Statute 15.25.010

The Court is aware it has the authority to diminish rights when there is a compelling need. No court has the authority to extinguish any right. Thus the outcome of this appeal can only be an upholding of Alaskans right to vote for candidates of their choice.

O'Callaghan chooses to take issue with a number of incorrect statements by the petitioner Kenneth Jacobus.

First, if the court chooses to grant certiorari, I pray it would not allow the Republican party to be the named appellant. "The Republican party is not a legal entity; it is an amorphous group of individuals that acts and can only act through persons." Shirely v. U.S.A., (359 US 255).

The Republican party has no rights, only persons have rights. The incorrect naming has caused great confusion in this case. The proper name for the appellant is Kenneth Jacobus, not the Republican party.

Second, the U.S. District Court did not make a tentative decision in Zwacki v. State, D92-414 CV (D. Alaska 1992). Petitioner's petition for certiorari pp. 8, 13 and 14. The district court issued a "preliminary conclusion that the lieutenant governor has the authority to promulgate regulations." That conclusion is factually incorrect.

The Lieutenant Governor has no authority to promulgate regulations. Only the Director of Elections has the authority to adopt election regulations (see Alaska Statute 15.15.010) and definition of Director (Alaska Statute 15.60.010[3]). The Legislature in 1980 removed the Lieutenant Governor as head of elections and replaced him/her with a Director of Elections.

The appellee admitted the Director, not the Lieutenant Governor, adopted the emergency regulations. This shows the Lieutenant Governor did not adopt the closed primary because he did not have the authority. Federal District Court Judge Singleton was simply incorrect with his preliminary finding that, "The Lt. Governor has the authority to promulgate regulations." Clearly, the Lieutenant Governor has no authority to promulgate regulations.

Additionally, Judge Singleton of U.S. District Court, while dismissing the case without prejudice, said on July 9, 1992 (Record 260-61):

> And I think everyone understands too, that the United States is not a party to this case and one of the things I did not want to do was give an opinion, advisory, tentative or otherwise...

There was no tentative decision by the district court.

O'Callaghan also takes mathematical issue with counsel. Jacobus' allegations of "...the state requires the RPA (Republican Party of Alaska) to accept registered political opponents as voters in its primary election." (Petition at p. 11) is mathematically flawed. First, the primary is not any political party's primary election. The primary election is for all voters in the state. The State of Alaska runs the election and pays for it. It is the state's election, not a political party's election. Additionally, almost 50% of Alaska's voters choose no party affiliation. It is these voters without party affiliation who determine which political party's candidates advance to the general election, not the political party members. It is not statistically possible for an "enemy" political party possessing a total of only 20% of the registered voters, to cross over and nominate a weaker primary opponent. It is the 50% non-affiliates who mathematically determine the primary winners, not the parties themselves.

The closed primary caused a dramatic drop in voter participation. In 1990, with a blanket primary 50.8% of the registered voters chose to vote. When the primaries were closed in 1992, 41.8% of the voters participated and in 1994, 32.1% of the voters chose to exercise that right. The closed

primary violates everyone's "right to vote for candidates of their choice" and diminishes voter participation.

THE QUESTIONS ON APPEAL

I. THE CONSTITUTIONALITY OF THE BLANKET PRIMARY

This issue was created by the Alaska Supreme Court. It was never raised in the lower court or by any party on appeal.

Extensive research led to the conclusion that it is a non-issue. Never in the history of any state or U.S. judicial proceedings has any primary type been overturned for any reason. The challenge to all parties was to find any case where such had been the outcome. No party could site such a case. The blanket primary is constitutional. However, the court's creation of a new point on appeal is highly unusual, and its inviting adverse parties to join has clearly violated my U.S. constitutionally protected rights of due process and equal protection.

II. TIMELINESS OF ADJUDICATION OF ELECTION ISSUES

The second issue is timeliness. With O'Callaghan, the Alaska Supreme Court has been in continual egregious error. See O'Callaghan v. State of Alaska, Hickel, Coghill, Campbell, Alaska Supreme Court Opinion 4368 (filed November 23, 1992) issued July 5, 1996, and O'Callaghan v. State, 826 P.2d 1132, cert. denied 506 US 860 (1992). A lack of timeliness has lead to a moot ruling on the issue of illegal

ballot access by the Governor and Lieutenant Governor in 1990 in Alaska Supreme Court S-6181. This opinion was issued on July 5, 1996, almost 6 years after the fact. Adjudication of election issues in a timely manner is essential to the preservation of a democracy. Of the 11 states I have researched, all have a statutorily mandated time frame for adjudicated.

Arizona Election Statute: 16-676, Time for Hearing Election Contest (A)..."The court shall set a time for the hearing of the contest, not later than **10 days**... (B)...**Five days** after the submission...court shall file its findings and immediately thereafter shall pronounce judgment..." (emphasis added)

Illinois Election Statute: 5/23-1.12a, Election Contest-Statewide-Timing and Finality of determination by Supreme Court. "The determination of the election contest shall be made **as soon as possible.**" (emphasis added)

5/23-1.10a, Election Contest-Statewide-**Final Decision by the Supreme Court**. "**Within 15 days** of the issuance of recommended findings of fact by a circuit judge..." (emphasis added)

California Election Statute: Election Contests §20068, Continuance; Judgment "The court shall continue in special session to hear and determine all issues arising in contested elections. After hearing the proofs and allegations of the parties and **within 10 days** after the submission thereof...and immediately thereafter shall pronounce judgment in the premises..." (emphasis added)

Washington Election Statute: Elections 29.04.030, Prevention and Correction of Election Frauds and Errors.

"An affidavit of an elector...must be filed...no later than the second Friday...and shall be heard **and finally disposed of by the court no later than five days after the filing thereof.**" (emphasis added)

Arkansas Election Statute: 7-5-807, Election Illegalities (a) "**...shall convene a special term at once** unless the regular term is in session or will convene in 30 days." (emphasis added)

Indiana Election Statute: 3-12-8-16, Trial of Contest Fixing Date - Notice - "The court shall fix a date within 20 days after the return day fixed in the notice to the contestee for the hearing of the contest." [P.L. 5 - 1986 & P.L. 10-1988 §157]

5-23-1.5a, Election Contest "...Time...Within 20 days of the filing of a petition of state election contest..."

Iowa Election Statute: Elections and Officers-Contests 60.5, Organization and Trial "The clerk of the court shall immediately after filing of the statement notify judges herein named and shall fix a day for the organization of the court **within three days**..." (emphasis added)

Delaware Election Statute: Contested Elections §5927, "The governor, whenever a notice of contest is served upon him, **shall immediately make proclamation convening such superior court** in special session..." (emphasis added)

Idaho Election Statute: Election-Contests 34-2011, Time for Trial - "The cause shall stand for trail at the expiration of thirty (30) days from the time of service..."

Oregon Election Statute: Elections 260.315, Court Proceedings... "A proceeding for **violation of an election law**

shall be advanced on the docket of the court upon request by any party..."

260.345, Complaints..."Any elector may file with any filing officer a written complaint alleging a violation of election law..."

"(3) Attorney General shall immediately examine the complaint...**within 48 hours**...notify the person who is the subject..." (emphasis added)

"(4) ...shall report the findings to the Attorney General and request prosecution."

Wisconsin Election Statute: 5.06, Compliance Review; Appeal

"(1) Whenever elector...believe that...the official to act with respect to any matter concerning nominations, qualifications of candidates or ballot preparation is contrary to law...the elector may file a written sworn compliant..."

"(2) A complaint is deemed disposed of...within **5 business days**" (emphasis added)

5.08, Petition For Enforcement

"If the District Attorney...fails to act within 15 days of the date of filing, the petitioner may file the same petition with the Attorney General, who may then commence the action."

It is the case in Alaska "sometimes".

"That opinion was issued on an expedited basis in light of the pressing need to print ballots." Vogler v. Miller, 660 P.2d 1192 (Alaska 1983).

All have a statutorily mandated time frame, Alaska being the exception.

When Governor Hickel lost to Governor Hammond in the primary of 1978, see 588 P.2d 256, the issue was decided

in Superior Court and Alaska Supreme Court well before the general election. The appellant has found that such is not the norm in Alaska courts. O'Callaghan has repeatedly asked the Superior and Supreme courts for expedited consideration on four different election issues O'Callaghan has litigated. O'Callaghan has been refused expedited consideration on all cases before Superior Court.

In light of the common law practice and aforementioned statutory mandation of shortened time frame for adjudication of election issues, the Alaska Court System is in egregious error. In California and Arizona, adjudication of election issues is mandated; 30 days in superior court and 10 days in supreme court. Alaska's courts have allowed 4 illegal ballots, 2 legislatures, congressmen and one governor to be illegally elected. These people illegally elected did not represent Alaskans. Such a delay extinguished the flame of democracy. There has been no timely remedy. The court has allowed illegal elections to take place and the court has chosen not to adjudicate in a timely manner, even knowing 11 states mandated by law rapid adjudication of election issues.

I pray that the Supreme Court of the United States mandate any state election involving congressmen be decided in any lower court within 30 days, and that any appeal to state supreme court or circuit court of appeals be decided within 20 days. Such an act would help resuscitate the flame of democracy.

III. FACTUAL ERRORS IN ALASKA SUPREME COURT OPINION 4338 ISSUED APRIL 12, 1996

The final issue on appeal deals with three factual errors in Alaska Supreme Court. Third opinion in O'Callaghan v. Coghill, 888 P.2d 1302.

All of these issues were addressed in the motion for rehearing filed in the Alaska Supreme Court on May 10, 1996.

A. The first factual error was on pages 4 and 5.

As discussed earlier, the court and the appellee were factually incorrect to propose Judge Singleton made a "tentative decision." Judge Singleton issued a preliminary conclusion which was factually incorrect.

B. The second factual error is the legality of the 1992 and 1994 general elections.

The Alaska Supreme Court's is in error by refusing to declare the 1992 and 1994 general elections illegal. The case numbers on appeal to the state court are 3AN-92-08552 CI and 3AN-92-11150 CI Consolidated. The second case was a separate action challenging the validity of the general election. These cases were consolidated by court order. O'Callaghan has never relinquished his challenge. Since the Alaska court declared the primary elections illegal, the general elections must have been illegal. A poison tree bears no good fruit. O'Callaghan prays that the Supreme Court of the United States invalidate the 1992 and 1994 general elections.

C. The third factual error is contained in footnote 21.

> "In the present case the appellant does not expressly seek to set aside an election. We therefore state no view as to whether or under

> what circumstances such relief might be available."

O'Callaghan prayed the elections be declared null and void and or illegal three times. Once in his original complaint (Record p. 2) "...that the election be declared null and void." The second time in O'Callaghan's opening brief filed September 27, 1995 p. 2 "The ballots I received in the primary and general should be found to be illegal...". Additionally, in O'Callaghan's appellate reply brief p. 10. "All four elections should be declared illegal."

Having clearly expressly sought to set aside four elections, I pray the Supreme Court of the United States declare under what circumstances such relief might be available. Another option might be a directional remand.

CONCLUSION

There are serious problems with the timely adjudication of elections in Alaska. The Alaska Supreme Court needs direction from the United States Supreme Court. See Court Opinion 4368, O'Callaghan v. State of Alaska, Hickel, Coghill, Campbell, issued July 5, 1996 in conjunction with O'Callaghan v. State, 826 P.2d 1132 (Alaska), cert. denied, 506 US 860 (1992). Also, the Alaska Supreme Court allowed the 1992 primary to pass while denying motions for expedited consideration. They allowed an election they knew was illegal to pass without a ruling.

In O'Callaghan's view, there was no effort by the Alaskan courts to make voters "whole." In ordering legal elections, the Alaska Supreme Court merely ordered the obvious. The State of Alaska, Division of Elections having

done illegal acts, needs to be punished for these illegal activity. O'Callaghan's motion to amend remedy filed October 14, 1993, granted November 8, 1993, proposed $50.00 be paid to primary voters, $50.00 for general election voters, and those who voted in both elections be paid $150.00 for having been given an illegal ballot. The Alaska Supreme Court denied any remedy. The issues of accuracy, timeliness and remedy need a finality the state courts appear to be unable to provide. I pray that the Supreme Court of the United States hear this case and make the voters of Alaska whole again by mandating accuracy, timeliness and remedy.

Respectfully submitted,

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Respondent

July 5, 1996

(A)

Supreme Court, U.S.
FILED
AUG 13 1996
OFFICE OF THE CLERK

No. 95-1962

In The

Supreme Court of the United States

October Term, 1995

REPUBLICAN PARTY OF ALASKA,

Petitioner,

v.

MIKE O'CALLAGHAN, JED WHITTAKER, ROBERT GIGLER, ALASKAN VOTERS FOR AN OPEN PRIMARY, and STATE OF ALASKA, LIEUTENANT GOVERNOR JACK COGHILL, in his official capacity as Lieutenant Governor,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alaska

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REGULATIONS

28 C.F.R. § 51.52(a) 1, 3

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Republican Party of Alaska (RPA) and its members have petitioned this court for a writ of certiorari to review the decision of the Supreme Court of Alaska in *O'Callaghan v. State of Alaska*, 914 P.2d 1250 (Alaska 1996).

This brief is filed pursuant to Rule 15.8 to apprise this Court of what has subsequently taken place in Alaska regarding the 1996 Republican Primary Election, and to demonstrate further why the Petition for Writ of Certiorari should be granted.

REGULATIONS INVOLVED

28 C.F.R. § 51.52 Basic Standard

(a) *Surrogate for the court.* Section 5 provides for submission of a voting change to the Attorney General as an alternative to the seeking of a declaratory judgment from the U.S. District Court for the District of Columbia. Therefore, the Attorney General shall make the same determination that would be made by the court in an action for a declaratory judgment under section 5: Whether the submitted change has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The burden of proof is on a submitting authority when it submits a change to the Attorney General for preclearance, as it would be if the proposed change were the subject of a declaratory judgment action in the U.S. District Court for the District of Columbia. See *South*

Carolina v. Katzenbach, 383 U.S. 301, 328, 335 (1966).

FURTHER PROCEEDINGS AND REASONS FOR GRANTING PETITION

After this Court denied a motion for stay filed by the Republican Party of Alaska (RPA), the RPA and Wayne Anthony Ross filed a motion for preliminary injunction in *Ross v. State of Alaska, et al.*, United States District Court No. A95-0053-CV (HRH). This motion sought interim implementation of Article XIV, Section 1, of the Rules of the RPA, for the purpose of the August 27, 1996, Alaska Primary Election. District Court Judge H. Russel Holland denied the motion for preliminary injunction by order dated July 17, 1996. (App. 1-15).

Judge Holland concluded that there is a strong likelihood of the RPA's success on the merits of the underlying Constitutional issue of free political association. (App. 6). His order further indicates, however, that the RPA could be bound by the decision in *O'Callaghan v. State of Alaska*, 914 P.2d 1250 (Alaska 1996), as a matter of *res judicata*. (App. 6).

The RPA also filed a motion for partial summary judgment regarding Article XIV, Section 5, of the Rules of the RPA relating to candidate requirements. Judge Holland denied this motion for partial summary judgment on July 31, 1996, holding that the motion was premature, and must ultimately be decided in the course of a decision on the merits of the claims of Wayne Anthony Ross and the RPA with respect to the state law blanket primary requirement. (App. 16-18).

Judge Holland can now be added to the list of judges who agree with the RPA's position on the Alaska blanket primary requirement.

> The court at this juncture believes that the Republican Party of Alaska has a constitutional right to change its mind about the efficacy of a blanket primary, as it did by enacting Rule 1.

Holland Order, July 17, 1996 (App. 14).

Judge Holland, however, is bound by the *res judicata* requirements set forth by this Court in *Allen v. McCurry*, 449 U.S. 90 (1990). Thus, if this Court does not grant the petition for writ of certiorari, Judge Holland may be required to hold that the RPA is bound by the erroneous decision of the Alaska Supreme Court limiting the right of the RPA and its members to free political association. Additionally, guidance from this Court is required for Judge Holland to deal with the other issues in *Ross v. State of Alaska* case, as referenced in the order of July 31, 1996. (App. 16-18).

The RPA tried to protect its right of free political association by attempting to conduct a private mail-in primary election in 1996. On May 28, 1996, the RPA submitted an application for preclearance under the Voting Rights Act to the Civil Rights Division of the United States Department of Justice, and requested expedited consideration on this application. Pursuant to 28 C.F.R. § 51.52(a), the Department of Justice is to determine whether the submitted change has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The Justice Department waited the full

sixty days to respond to the RPA's application, and then responded by letter requesting a massive amount of additional information. (App. 19-22). An additional sixty days will begin running after the RPA submits these requested materials. The effect of the Department of Justice's response is that the Republican Party will not be able to privately opt out of the Alaska Law Blanket Primary Election in 1996 because of lack of time. In fact, the RPA may very well not be able to obtain a preclearance from the Department of Justice for a private "opt out" at all.

The letter from the Department of Justice indicates that it will be utilizing the *O'Callaghan* decision as part of its preclearance analysis. Unless this court grants the Petition for Writ of Certiorari, the RPA will be in an untenable position. The Department of Justice will deny preclearance because a private "opt out" violates *O'Callaghan*. On the other hand, the District Court will not authorize a private mail-in primary because the Department of Justice has not issued a preclearance, notwithstanding the fact that the District Court believes that the RPA has the Constitutional right to conduct its primary as it sees fit.

In summary, Judge Holland now also has stated that the RPA is correct as a matter of law. Yet, the situation is getting more and more complicated, the RPA and its members have lost their Constitutional right of free political association for the 1996 Alaska Republican Primary Election, and may very well lose their Constitutional right to free political association entirely because of *res judicata*. This Court should protect the RPA's right of free

political association, as well as provide guidance to California, Virginia, and the rest of the nation, by granting the Petition for Writ of Certiorari.

CONCLUSION

The right of free political association of the RPA and its members has been violated for the 1996 primary election, and there will be no remedy. Unless this Court grants the Petition for Writ of certiorari, the RPA may be bound by an erroneous State court interpretation of federal Constitutional law as a matter of *res judicata*, and there may never be a remedy.

The RPA respectfully requests that this Court grant the Petition for Writ of Certiorari, and reverse the decision of the Supreme Court of Alaska.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

WAYNE ANTHONY ROSS, et al., Plaintiffs, vs. STATE OF ALASKA, et al., Defendants.	)	No. A95-0053-CV (HRH)

ORDER

(Filed Jul. 17, 1996)

Motion for Preliminary Injunction

The plaintiffs commenced this action by the filing of a complaint on February 16, 1995.[1] This initial complaint sought a declaratory judgment and injunctive relief in connection with certain rules of the Republican Party. It was belatedly discovered that this initial complaint inadvertently omitted from the prayer for relief reference to Sections 1 and 3 of Article XIV of the Rules of the Republican Party. The court authorized the filing of a second amended complaint[2] to cure this oversight by order filed July 3, 1996.[3]

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[1] Clerk's Docket No. 1.

[2] Clerk's Docket No. 42. A first amended complaint, Clerk's Docket No. 11, contained the same omission as the original complaint.

[3] Clerk's Docket No. 39.

By virtue of this amendment, it is clear that plaintiffs seek declaratory and injunctive relief enforcing a Republican Party rule which provides:

> Only registered Republicans, registered Independents, and those who state no preference of party affiliation shall be allowed to vote in the Republican primary election for Governor, Lieutenant Governor, U.S. Senator, U.S. Representative, and members of the State Legislature.

Republican Party of Alaska, Rules, Art. XIV, § 1.

On July 2, 1996, plaintiffs' motion for a preliminary injunction – seeking interim implementation of Rule 1 for purposes of the upcoming August 27, 1996, Alaska primary election – was filed with this court.[4] The motion is opposed. Oral argument has not been requested by the parties and is not deemed necessary.

The basic historical facts from which plaintiffs' complaint and the instant motion flow are not disputed. Since 1967 the Alaska election code has provided for a single "blanket" primary election in which a voter, regardless of his party registration (if any) might vote as to each or any office on the ballot for any candidate on the ballot, regardless of the candidate's party affiliation (if any).[5] AS 15.25.010, -.060. The principal focus of plaintiffs' concern is that the state's blanket primary procedure permits

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[4] Clerk's Docket No. 38.

[5] Session Laws of Alaska 1967, chapter 1:

An Act. Giving voters the right to vote for candidates without regard to party affiliation in primary elections.

registered Democrats to have a say in who will be the Republican Party nominee for each office on a given ballot. Under the current Republican Party rule, only registered Republicans, registered Independents, and those who have expressed no party preference when registering to vote are invited to participate in the selection of Republican Party candidates for the general election.

Much of the procedural history of the dispute over who should participate in primary elections is set out in both an earlier *O'Callaghan* decision[6] and in the most recent *O'Callaghan* decision.[7] For purposes of this motion, we reiterate a few details. Prior to the *O'Callaghan v. State* decision, the Alaska Republican Party had been invited by the Alaska Supreme Court to intervene in that case. The Republican Party had not been joined in the case and had not itself sought to intervene, although the litigation certainly had potential for affecting the Republican Party, apparently because the state officials were aligned with the party. There was, however, a change of administration in the state of Alaska by the time *O'Callaghan v. State* reached the Alaska Supreme Court, and the state determined to change its legal position on the subject of whether or not the Republican Party rules or the state primary election law should control.

With the change of the state's position, the Republican Party had no advocate before the Alaska Supreme

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[6] *O'Callaghan v. Coghill*, 888 P.2d 1302 (Alaska 1995).

[7] *O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996).

Court and intervened at the invitation of that court.[8] Before the Alaska Supreme Court, the Republican Party argued that it was entitled to prevail on the extant record as a matter of United States constitutional law as determined by the United States Supreme Court in such cases as *Burdick v. Takushi*, 504 U.S. 428 (1992); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); and *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 (1981). In the alternative, the Republican Party sought to have the case remanded to the superior court where it hoped to develop a factual record with respect to the plaintiff's right of association under the First Amendment to the United States Constitution.

Applying federal law, the Alaska Supreme Court decided the case on legal issues in favor of the state.[9] The majority of the Alaska Supreme Court, Justice Rabinowitz dissenting, held that:

> Taken individually and collectively these justifications [offered by the state] seem to us to be

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[8] The Republican Party commenced this action at about the same time, and also removed the state court proceeding from the Alaska Supreme Court to this court. In the removed proceedings, this court encouraged the parties to abandon the *O'Callaghan* litigation in favor of proceeding with this case. For reasons which the parties deemed important to them, they decided to proceed with *O'Callaghan*, and the court ultimately remanded that case to the Alaska Supreme Court where the issue under consideration was decided in favor of the state's blanket primary statute. In the meantime, there was no significant activity in this case.

[9] *O'Callaghan v. State*, 914 P.2d at 1261, n.16.

> legitimate and important. Collectively they outweigh the harms to RPA's [Republican Party of Alaska's] associational interests claimed in this case.

O'Callaghan v. State, 914 P.2d 1250, 1262-63 (Alaska 1996). That court ordered that "the 1996 primary be conducted in accordance with Alaska's Statutes. *Id.* at 1263.

With this introduction, the court now turns to the merits of plaintiff's motion for a preliminary injunction.

The parties do not disagree with respect to the standards for granting preliminary injunctive relief. The appropriate standard is set forth in *Native Village of Quinhagak v. United States*, 35 F.3d 388, 392 (9th Cir. 1994), and *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1389 (9th Cir. 1988). Simply put:

> Where a party can show a strong chance of success on the merits, he need only show a possibility of irreparable harm. Where, on the other hand, a party can show only that serious questions are raised, he must show that the balance of hardships tips sharply in his favor.

Bernard v. Air Line Pilots Ass'n Int'l. AFL-CIO, 873 F.2d 213, 217 (9th Cir. 1989).

Merits of the Case

In order to demonstrate a strong chance of success on the merits of this case, plaintiffs must make two showings: firstly, that there is a strong likelihood that they will convince this court that the party's associational rights are entitled to preference over the state's choice of a blanket primary; and, secondly, that the plaintiffs are not

barred from relitigating that issue by the second *O'Callaghan* decision of the Alaska Supreme Court.

For the reasons and upon the authorities articulated by Justice Rabinowitz in his dissent to the second *O'Callaghan* decision,[10] this court concludes, for purposes of the instant motion, that there is a strong likelihood of plaintiffs' success on the merits of the underlying constitutional issue.

As to the *res judicata* issue, the court is not at all persuaded; and the *res judicata* defense which the state will raise could trump plaintiffs' entire case as to the enforceability of Rule 1 in preference to the state's blanket primary law.[11] The Alaska Supreme Court decided the First Amendment right of association issue which was before it and is before this court on the merits.[12] The matter of whether or not the Alaska Supreme Court has correctly applied federal law does not preclude application of the *res judicata* doctrine.

As discussed above, the issue raised in *O'Callaghan v. State* and here are precisely the same. In each instance, the Republican Party of Alaska asserts that its First Amendment right of association is violated by the Alaska

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[10] *O'Callaghan v. State*, 914 P.2d at 1264.

[11] The state has not yet filed its answer to the plaintiffs' second amended complaint; however, the state's opposition to the motion for preliminary injunction makes it very clear that this defense must be addressed. Opposition to motion for preliminary injunction, Clerk's Docket No. 40 at 13-14.

[12] Plaintiffs raise other issues in this case, but plaintiffs' motion for a preliminary injunction is predicated only upon the conflict between Rule 1 and the state primary election law.

blanket primary law. The Republican Party was before the Alaska Supreme Court and opted to litigate the issue there out of a concern that, were it not present, it would have no opportunity to petition for a writ of *certiorari* for the United States Supreme Court in the event of a loss. Tactically that was probably a proper judgment on the part of plaintiffs, but it carries potential consequences, one of which is that *res judicata* applies to state court determinations of federal constitutional issues. *Allen v. McCurry*, 449 U.S. 90 (1990). This court is not empowered to review decisions of the Alaska Supreme Court. The United States Supreme Court does have that power, and plaintiff Republican Party has petitioned for a writ of *certiorari* and a stay of *O'Callaghan v. State*.[13]

Plaintiff Ross was not a party to *O'Callaghan*. On the briefing presently before the court, the court is unconvinced that issue preclusion will not apply to Ross. His claim of associational rights are, for all practical purposes, identical to those of the Republican Party of Alaska. He asserts the same fundamental right, he challenges the same blanket primary process. The effect upon him of the potential deprivation of rights is only marginally different from that upon the party, of which he is a Republican national committeeman.

In summary, the court concludes for purposes of plaintiffs' motion for a preliminary injunction that this case poses two questions: (1) whether the state's blanket primary unacceptably infringes upon the associational

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[13] The initial stay application was denied. A second stay application has reportedly been denied as well.

rights of the plaintiffs; and (2) whether the doctrine of *res judicata* precludes the plaintiffs from relitigating the first issue. As to the first issue, there is a strong chance that plaintiffs would succeed on the merits. As to the second issue, plaintiffs have raised a serious issue, but have not convinced the court that they have a strong chance of prevailing. Because the second issue has the potential for being determinative of the Rule 1 (blanket primary) dispute in this case, the court is not able to say that the plaintiffs have demonstrated a strong chance of success on the merits. At best, there is a serious question as to whether *res judicata* will bar plaintiffs' efforts to enforce the party's Rule 1. The court now turns to application of the appropriate secondary arm of the standard for granting or denying a preliminary injunction: the balance of hardships.

Balance of Hardships

Because the court has determined that there is not a strong likelihood of plaintiffs' success on the merits of this case, they must demonstrate that the balance of hardships tips sharply in their favor. *Bernard*, 873 F.2d at 217.

The Republican Party contends that it will suffer irreparable harm or, in the alternative, that the balance of hardships tips sharply in the party's favor. The evidentiary support for this contention is problematic. Were the court convinced that the Republican Party had made a strong showing of its chances of succeeding on the

merits, then the affidavit of Deborah Luper[14] might suffice. Under the "likelihood of success" formulation of the standard for granting or denying a preliminary injunction, one need only show the "possibility of irreparable injury". *Native Village of Quinhagak,* 35 F.3d at 392. The Luper affidavit postulates that in a number of Alaska election districts, Democratic Party voters will cross-over and vote for a Republican candidate perceived to be the weakest of several so as to deprive the Republican Party of the opportunity to elect its strongest candidate. The affidavit is speculative, but it might carry the day where only a possibility of irreparable harm need be shown.

When it comes to balancing the hardships, the Luper showing does not stand for much. The affiant states in most conclusory form that she is a political consultant and that she has the requisite personal knowledge and expertise to make the affidavit in question.[15] It is not possible to tell whether the affiant is a formally educated political scientist. The affidavit offers no insight into how the affiant has come to the conclusion that cross-over voting may take place. Perhaps most important, what *may* happen is not very persuasive or weighty when it comes to a balancing of hardships. What may happen also may not happen.

In their reply memorandum, the plaintiffs argue (without any affidavit to support the statements) that there have been numerous instances in the past where cross-over voting has changed the results of elections in

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[14] Clerk's Docket No. 38, Exhibit C.

[15] Clerk's Docket No. 38, Exhibit C, pp. 1-2.

Alaska. The court has a very clear recollection of some of the instances to which the plaintiffs point. As to some of these instances, the court recalls that there was great speculation in the media that cross-over voting affected the election result. The court is unaware (and plaintiffs offer no evidence) that anyone has ever performed any sort of scientific evaluation of these elections sufficient to establish that deliberate cross-over voting – and not deliberate, personal preference for a candidate – altered the election results. The court declines to find any significant harm in the plaintiffs' (or the court's) anecdotal memory of an Alaskan election.

For its part, the state in essence contends that it will be caused great inconvenience and some significant expense were the court to require it to redesign the 1996 primary election process for the entire state at this late date. In an affidavit, the director of the Division of Elections for the State of Alaska avers that the conduct of the upcoming election will require travel to and training in all of the Alaska election districts for some 2,228 persons who will serve as local election officials. The affiant states that "[m]any of these officials will lack prior experience in the conduct of elections."[16] Particular problems are identified with the training of election officials for the far-flung rural precincts of the state which are managed out of Nome and Fairbanks. The training in these areas for the 1996 primary election was undertaken during May. Training for rural precincts in the Anchorage and Juneau

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[16] Clerk's Docket No. 40, Exhibit 3, p. 2.

regions has also already been accomplished. The training in question took a month and a half to complete.[17]

The foregoing showing is uncontested. The court finds that it would be extremely difficult for the state election officials to retrain primary election officials in the six weeks which remain before the primary election. This is so principally because it would be necessary first to reassemble, reprint, and redistribute handbooks and forms adapted to a two-ballot, rather than a one-ballot, election. The court finds that it is theoretically possible that the election process could be redesigned and implemented by August 27, 1996; but it would take a crash program, and the effort might fail.

The court also finds on the basis of the affidavit of the director of elections that the process of printing ballots, which is currently far advanced, could not be replicated for a two-ballot election such as the plaintiffs seek without a significant risk that some remote election districts would be without ballots on August 27, 1996.

The court finds that a change in the election process at this point might very well disenfranchise as many as 750 overseas voters. *Id.* at 5.

On the basis of the record made by the parties with respect to this motion, the court is not able to find that the balance of hardships tips sharply in the plaintiffs' favor. All of the harm foreseen by the parties is to some degree speculative. The risk of harm to the state is at least as substantial as that to the plaintiffs.

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[17] *Id.*, Exhibit 3, pp. 2-3.

Public Interest

The public interest is an additional factor which the Ninth Circuit Court of Appeals enunciated in *Native Village of Venetie* when setting out the standards for granting or denying preliminary injunctive relief. *Alaska v. Native Village of Venetie*, 856 P.2d 1384, 1389 (9th Cir. 1988).

In this case, the parties differ as to what is sufficiently important to rise to the status of a public concern. Plaintiffs speak of strengthening the party and suggest that the "will of the people" as reflected by state legislation is irrelevant.[18] Also, and while conceding some disruption in the election process if a preliminary injunction were granted, the plaintiffs urge the deprivation of their First Amendment rights to be of far greater public importance than administrative inconvenience. For its part, the state argues that granting an injunction would contravene the will of the people as expressed in the state primary election statute. The state argues, on the basis of this court's earlier decision in *Doyle v. Alaska*, No. A90-0248-CV,[19] that there is "a substantial public interest in having elections conducted timely and in an orderly fashion."[20]

The court has not changed its view of the importance of timely, well-organized elections. What is administrative inconvenience to the state, as set out in the foregoing discussion of harm, poses a serious risk of substantial

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[18] Reply memorandum at 14, Clerk's Docket No. 41.

[19] Order of July 16, 1990, denying preliminary injunction, *Doyle v. Alaska*, No. A90-0248-CV, attached as Exhibit 1 to state's opposition memorandum, Clerk's Docket No. 40.

[20] *Id.* at 19 (citations omitted).

disruption of the orderly primary election processes. If election officials become confused because they have been provided with two sets of materials for the upcoming election, it is in reality the public who will suffer. If ballots are not available at all election precincts on August 27, 1996, then some emergency relief will have to be provided by election officials; and, again, the orderly election process will have been disrupted.

On the peculiar facts of this case, there is another, very serious, public interest consideration. The highest court of the State of Alaska has determined that the state primary election laws should be enforced as is and in preference to Rule 1, Article XIV, of the Rules of the Republican Party of Alaska. State election officials are obligated to follow that decision and have set out to do so. What are the state officials supposed to do if this court now intervenes and enters a conflicting order? Does the more recent order carry the day? What if the state succeeds in obtaining from the Alaska Supreme Court some sort of "reaffirmation" of its decision subsequent to an order issued by this court? Does a federal court order on a federal constitutional issue take precedence over a state court order on the same issue?

There may very well be cogent answers to these questions, but it would be unseemly for election officials to be caught in such a cross-fire a scant six weeks before a primary election is to be held. At a time when the public view of government in general is (to say the least) jaded, this court deems it not to be in the public interest for its to put the state into a position where it is subject to absolutely conflicting orders from two different courts except for the most compelling of reasons.

Blanket primaries were conducted in this state for almost thirty years. The court at this juncture believes that the Republican Party of Alaska has a constitutional right to change its mind about the efficacy of a blanket primary, as it did by enacting Rule 1. The efficacy of that rule has been litigated, and the Republican Party lost. The Republican Party has a potential remedy in the United States Supreme Court, and it is actively pursuing that remedy at this time. This court declines to create a confrontation at a point in time so near the primary election as to make it difficult for either party to comply or seek other effective relief.

The court declines to consider ordering a Republican Party mail ballot. Such procedure does not comport with either AS 15.25.010, *et seq.*, or the state law expressly dealing with voting by mail. AS 15.20.800. Moreover, plaintiffs have not yet obtained a pre-clearance decision from the Voting Section of the Department of Justice. Absent such a decision, action by this court would be premature. *See* authorities discussion in Order of July 14, 1990, *Doyle v. Alaska*, No. A90-0248-CV.[21]

The motion for preliminary injunction is denied.

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[21] Clerk's Docket No. 40, Exhibit 1, pp. 10-12.

DATED at Anchorage, Alaska, this 17 day of July, 1996.

/s/ H. Russel Holland
H. Russel Holland, Judge
District of Alaska

IMMEDIATE NOTIFICATION
IS REQUESTED

A95-0053-CV (HRH)

K. JACOBUS
J. GAGUINE (AAG-JUNEAU)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

WAYNE ANTHONY ROSS, et al., Plaintiffs,	)	No. A95-0053-CV (HRH)
vs.	)	
STATE OF ALASKA, et al., Defendants,	)	

ORDER

(Filed Jul. 31, 1996)

Motion for Partial Summary Judgment

Plaintiffs move for partial summary judgment[1] as regards Article XIV, Section 5 (candidate requirements), Rules of the Republican Party. The motion is opposed. Oral argument has been requested, but is not deemed appropriate at this time.

The motion for partial summary judgment is denied, not because the court is of the view that the motion lacks merit, but because the court shares the view of the defendants that this motion is in a very real sense premature. The court's reason for this conclusion is not the same as that of the State of Alaska, however.

The court has not yet decided whether the plaintiffs' associational rights which are at issue in this case are to

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[1] Clerk's Docket No. 28.

be subject to a strict scrutiny analysis, or whether some less demanding test will apply. The court has of course given the parties a glimpse of its view of this matter, but it is an important issue that must ultimately be decided in the course of a decision on the merits of the plaintiffs' claims with respect to the state law blanket primary requirement. The court does not desire to take a final position on that issue in the course of the instant motion. Moreover, if the state were right that this case should call into play not strict scrutiny of plaintiffs' rights but a balancing test of plaintiffs' interests versus defendants' interests, then whether or not the statutory blanket primary survives constitutional scrutiny in federal court could affect the balance and/or the need for the particular Republican Party candidate requirement rule which is at issue here. In other words, if Democrats cannot vote in the Republican primary, concern over divisive primary candidate filings may be very different.

The motion for partial summary judgment is denied with leave to renew that motion summarily in association with motion practice which the court anticipates with regard to the merits of the blanket primary dispute between the parties. In this regard, it is the court's intention that a status conference be convened in this case at a time convenient to the parties and the court during the month of September 1996.

DATED at Anchorage, Alaska, this 31 day of July, 1996.

/s/ H. Russel Holland,
H. Russel Holland, Judge
District of Alaska

A95-0053-CV (HRH)

K. JACOBUS✓
J. GAGUINE (AAG-JUNEAU)

U.S. Department of Justice

[SEAL]

Civil Rights Division

Voting Section
P.O. Box 66128
Washington, D.C. 20035-6128

DLP:RAK:HEW:tlb
DJ 166-012-3
96-2515

July 30, 1996

Kenneth P. Jacobus, Esq.
Legal Counsel
Republican Party of Alaska
425 G Street, Suite 920
Anchorage, Alaska 99501-2140

Dear Mr. Jacobus:

This refers to the procedures for a 1996 mail-in primary election for the Republican Party of Alaska in the State of Alaska, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on May 31, 1996; supplemental information was received on July 11 and 18, 1996.

Our analysis indicates that the information sent is insufficient to enable us to determine that the proposed change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language

minority group, as required under Section 5. The following information is necessary so that we may complete or review of your submission:

1. Copies of all minutes, resolutions or other documents that show the proposed change to have been finally adopted by the Republican Party of Alaska.

2. Copies of all petitions for *certiorari*, briefs, applications for stay, motions or other pleadings filed with the United States Supreme Court with regard to the appeal of *O'Callaghan v. State of Alaska*, 914 P.2d 1250 (Alaska 1996). Describe the present status of that case before the Supreme Court.

3. A detailed, chronological description of the process leading to the adoption of the proposed mail-in primary procedures. Identify all meetings or discussions, whether formal or informal, concerning the proposed change. Identify any minority input regarding the proposed change or any alternative provision, including the name and daytime telephone number of any minority person or organization commenting on the proposed change, the substance of the comments or suggestions, and the action taken in response.

4. A description of all publicity regarding the proposed mail-in primary, including public notices, notices to voters, television or radio notices, newspaper articles, editorials or letters to the editor.

5. Under existing election procedures voters may change their party affiliation on the day of the primary at their polling place. Discuss whether this will be possible under the proposed mail-in voting procedures.

6. An explanation of what procedures, if any, the Republican Party of Alaska proposes to employ in order to conduct the proposed mail-in primary in accordance with the requirements of Sections 4(f) (4) and 203 of the Voting Rights Act, 42 U.S.C. 1973b(f) (4) and 1973aa-1a. Include a detailed description of any procedures designed to make minority language assistance available to voters who presently obtain such assistance at their polling places on election day.

In addition, please discuss the legal authority for the Republican Party of Alaska to adopt mail-in primary election procedures. We note that the Attorney General has precleared a submission by the State of Alaska to conduct the 1996 primary election under the state "blanket primary" law, pursuant to the decision of the Alaska Supreme Court in *O'Callaghan v. State of Alaska,* and that the United States Supreme Court has denied two applications for a stay of the *O'Callaghan* decision. We note further that the Republican Party of Alaska's motion for preliminary relief, including a request for court-ordered implementation of the mail-in primary, was denied by the United States District Court for the District of Alaska in *Ross v. State of Alaska,* No. A95-0053-CV (Mem. Op. July 17, 1996). To the extent that the proposed change relies upon court-ordered implementation, please discuss the effect of the identified decisions.

The Attorney General has sixty days to consider a completed submission pursuant to Section 5. This sixty-day review period will begin when we receive the information specified above. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.37). However, if no response is received within sixty days of this request,

the Attorney General may object to the proposed change consistent with the burden of proof placed upon the submitting authority. See also 28 C.F.R. 51.40 and 51.52(a) and (c). Changes which affect voting are legally unenforceable unless Section 5 preclearance has been obtained. *Clark v. Roemer,* 500 U.S. 646 (1991); 28 C.F.R. 51.10. Therefore, please inform us of the action the Republican Party of Alaska plans to take to comply with this request.

If you have any questions concerning this letter or if we can assist you in obtaining the requested information, you should call Ms. Hallue Wright (202-307-6261) of our staff. Refer to File No. 96-2515 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

By: /s/ Elizabeth Johnson
Elizabeth Johnson
Acting Chief,
Voting Section

(6)

Supreme Court, U.S.
FILED
AUG 23 1996
CLERK

No. 95-1962

In The

Supreme Court of the United States

October Term, 1995

REPUBLICAN PARTY OF ALASKA,

Petitioner,

v.

MIKE O'CALLAGHAN, JED WHITTAKER, ROBERT GIGLER, ALASKAN VOTERS FOR AN OPEN PRIMARY, AND STATE OF ALASKA, LIEUTENANT GOVERNOR JACK COGHILL, IN HIS OFFICIAL CAPACITY AS LIEUTENANT GOVERNOR,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alaska

SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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4 pp

SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Republican Party of Alaska (RPA) and its members have petitioned this court for a writ of certiorari to review the decision of the Supreme Court of Alaska in *O'Callaghan v. State of Alaska*, 914 P.2d 1250 (Alaska 1996).

This second supplemental brief is filed pursuant to Rule 15.8 to apprise this Court of what has recently taken place at the Republican National Convention, and to demonstrate further why the Petition for Writ of Certiorari should be granted.

FURTHER PROCEEDINGS AND REASONS FOR GRANTING PETITION

On August 12, 1996, at the Republican National Convention held at San Diego, California, the Republican Party adopted National Party Rule 34(f), which reads as follows:

> On or after January 1, 1997, no state law or party rule shall be observed that allows persons who have participated or are participating in the selection of any nominee of a party other than the Republican Party, including, but not limited to, through the use of a multi-party primary or similar type ballot, to participate in the selection of a nominee of the Republican Party for that general election. No person nominated in violation of this rule shall be recognized as the nominee of the Republican Party. If state law or state party rule provides for the selection of the nominee of the Republican Party in violation of this rule, the Republican nominee shall be selected

> by a convention convened and held under procedures not inconsistent with the provisions of Rule No. 32(c), unless a state party rule provides specifically to the contrary.

This rule was adopted in response to the infringements placed on the right of the Republican Parties of the various states to free political association, imposed by *O'Callaghan v. State of Alaska*, 914 P.2d 1250 (Alaska 1996) and California Initiative Proposition 198, mandating open primary elections in the States of Alaska and California.

The necessity of the Republican Party to protect itself from state legislation forcing it to allow Democrats and members of other political parties from voting in Republican Primary elections has now been recognized at the national level. The Alaska Open Primary is now in violation of National Republican Party Rules. No person nominated in the Alaska Open Primary election can be recognized as the nominee of the Republican Party. The Republican Party of Alaska (RPA) must now select its nominees by convention, unless a state party rule provides specifically to the contrary. Of course, nomination by convention also violates the Alaska Statutes.

The RPA will not be able to comply with the Alaska Statutes, Republican Party Rule 34(f), and also protect its first amendment right of free political association. A possible effect the conflict between the Alaska Statutes, Republican Party Rule 34(f), and the RPA's of free political association may have is that the RPA may not be able to have any of its candidates recognized as nominees of the Republican Party, and placed on future Alaska general election ballots.

With the enactment of Republican Party Rule 34(f), the negative impact of the *O'Callaghan* decision and California Initiative Proposition 198 has been formally spread nationwide, and the harm to the RPA and its members is continuing to increase. The root of the problem is *O'Callaghan v. State of Alaska*, 914 P.2d 1250 (Alaska 1996). This Court is the only venue that can now deal with the *O'Callaghan* decision, and protect the right of free political association, not only of the RPA and its members, but of all state Republican and other political parties and their members nationwide.

CONCLUSION

The RPA respectfully requests that this Court grant the Petition for Writ of Certiorari, and reverse the decision of the Supreme Court of Alaska.

Respectfully submitted,

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